No. 88-339

Supreme Court, U.S.
FILED
AUG 11 1988
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1988

JOHN H. STAMLER, RICHARD RODBART, EDMUND TUCKER AND PATRICK MALONEY,

Petitioners,

vs.

JOHN N. ZAMBONI,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

ZAZZALI, ZAZZALI, FAGELLA & NOWAK
Attorneys for Petitioners
One Gateway Center
Newark, New Jersey 07102
(201) 623-1822

ROBERT A. FAGELLA
JAMES R. ZAZZALI
Of Counsel and
On the Petition

7555
Lutz Appellate Printers, Inc. • NJ (201) 257-6850 • (800) 3 APPEAL • NY (212) 840-4640 • MA (617) 542-1114 DC (202) 783-7288 • PA (215) 925-6500 • USA (800) 5 APPEAL

QUESTION PRESENTED FOR REVIEW

1. Whether the court of appeals erred in concluding that complaints by a lieutenant of detectives concerning his dissatisfaction with a personnel reorganization of the Union County Prosecutor's Office where he was employed were matters of public concern.

2. Whether the court of appeals erred in concluding that only "actual disruption" of a prosecutor's office caused directly by employee speech on a purported matter of public concern may outweigh alleged First Amendment interests.

TABLE OF CONTENTS

Page

Questions Presented for Review i

Table of Contents ii

Table of Citations iii

Opinions Below 1

Statement of Jurisdiction 2

Constitutional Provisions Involved 2

Statement of the Case 2

Reasons for Granting the Writ 12

I. The Court should grant the petition for certiorari because the decision of the court of appeals constitutes a radical departure from the Court's settled rules concerning criticism of personnel decisions in a prosecutor's office, and represents a significant departure from decisions of the courts of appeals of other circuits on this issue. 12

II. Even if Zamboni's opposition to the office reorganization implicated a matter of public concern, that interest was outweighed by the prosecutor's compelling need to maintain order in his office, and the court of appeals created an erroneous legal standard in requiring actual disruption before responsive disciplinary action may be taken. 23

Contents

Page

Conclusion 30

TABLE OF CITATIONS

Cases Cited:

Altman v. Hurst, 734 F.2d 1240 (7th Cir. 1984) 18

Calaway v. Hafeman, 832 F.2d 414 (7th Cir. 1987) 18

Connick v. Myers, 461 U.S. 138, 183 S. Ct. 1684, 75 L. Ed. 2d 708 (1983) .....passim

Czurlanis v. Albanese, 721 F.2d 98 (3rd Cir. 1983) 19

Davis v. West Community Hospital, 755 F.2d 455 (5th Cir. 1985) 19, 28

Fiorillo v. Department of Justice, 795 F.2d 1544 (Fed. Cir. 1986) 16

Linhardt v. Gladfelter, 771 F.2d 1004 (7th Cir. 1985) 16, 18

Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274, 50 L. Ed. 2d 471, 97 S. Ct. 568 (1977) 29

McKinley v. City of Eloy, 705 F.2d 1110 (9th Cir. 1983) 17

Contents

Page

McMullen v. Carson, 754 F.2d 938 (11th Cir. 1985) 26

Murray v. Gardner, 741 F.2d 434 (D.C. Cir. 1984, cert. denied, 470 U.S. 1050 (1985) 16, 17, 18, 26, 28

Owens v. City of Derby, 586 F. Supp. 36 (D.C. Cir. 1984) 26

Pickering v. Board of Education, 391 U.S. 563, 20 L. Ed. 2d 811, 88 S. Ct. 1731 (1968).....23, 29

Rankin v. McPherson, ____ U.S. ____, 97 L. Ed. 2d 315, 107 S. Ct. 2891 (1987) 24, 26, 28

Renfroe v. Kirkpatrick, 722 F.2d 714 (11th Cir. 1984), cert. denied, 105 S. Ct. 98 (1988) 19

Rode v. Dellaciprete, 845 F.2d 1195 (3rd Cir. 1988) 19

Sipes v. United States, 744 F.2d 1418 (10th Cir. 1984) 18

Sprague v. Fitzpatrick, 546 F.2d 560 (3rd Cir. 1976) 26, 27

Trotman v. Board of Trustees of Lincoln University, 635 F.2d 216 (3rd Cir. 1980) 19

Zamboni v. Stamler, 194 N.J. Super. 598, 447 A.2d 449 (Law Div. 1984), aff'd, 199 N.J. Super. 378, 489 A.2d 1169 (App. Div. 1985) 4

Contents

Page

Zamboni v. Stamler, 194 N.J. Super. 602, 447 A.2d 453 (1985) 5

Zamboni v. Stamler, 847 F.2d 73 (3rd Cir. 1988) 1

Yoggurst v. Stewart, 739 F.2d 293 (7th Cir. 1984)..... 18

Statutes Cited:

28 U.S.C. § 1254(1) 2

42 U.S.C. § 1983 3

N.J. Stat. Ann. 2A:157-1 et seq..... 3

N.J. Stat. Ann. 11:5-1 8

N.J. Stat. Ann. 11a:1-1 et seq. 4

United States Constitution Cited:

First Amendment .....passim

Fourteenth Amendment 3

Other Authority Cited:

N.J.A.C. 4:1-17.7 8

APPENDIX

Appendix A — Opinion of the United States Court of Appeals for the Third Circuit Dated May 17, 1988..... 1a

Contents

Page

Appendix B — Judgment and Order of the United States Court of Appeals for the Third Circuit 23a

Appendix C — Opinion of the United States District Court for the District of New Jersey Dated June 10, 1987 ..... 25a

Appendix D — Letter from John Zamboni to Eugene McCaffrey Dated March 8, 1983 ..... 55a

Appendix E — Letter from John Zamboni to John Stamler Dated March 21, 1983 ..... 65a

Appendix F — Complaint in Lieu of Prerogative Writ 69a

No.

In The

Supreme Court of the United States

October Term, 1988

JOHN H. STAMLER, RICHARD RODBART, EDMUND TUCKER AND PATRICK MALONEY,

Petitioners,

vs.

JOHN N. ZAMBONI,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The petitioners, John Stamler, *et al.*, respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in this proceeding on May 17, 1988.

OPINIONS BELOW

The opinion of the Court of Appeals dated May 17, 1988 is reported at 847 F.2d 73 (3rd Cir. 1988) and is reproduced in the Appendix hereto at pp. 1a-22a. The opinion of the District Court of the District of New Jersey dated June 9, 1987 and from which appeal was taken is unpublished and is reproduced in the Appendix hereto at pp. 25a-54a.

STATEMENT OF JURISDICTION

On May 17, 1988, the Court of Appeals for the Third Circuit entered its judgment in the matter for which review is sought in this petition (23a). Jurisdiction to seek the writ of certiorari prayed for in this petition is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provision involved is the First Amendment to the United States Constitution, and provides in pertinent part:

> "Congress shall make no law . . . abridging the freedom of speech . . . .

STATEMENT OF THE CASE

This is an appeal from a decision of the United States Court of Appeals for the Third Circuit, reversing a final decision by the District Court for the District of New Jersey which had dismissed respondent Zamboni's complaint and entered summary judgment on behalf of all respondents. Petitioners seek review by this Court because the court of appeals' decision radically and improperly erodes the standards governing the permissible scope of personnel criticism in a prosecutor's office.

Respondent John Zamboni, plaintiff below, is a Lieutenant of Detectives in the Union County Prosecutor's Office, and has held this office at all times relevant to this suit. The Union County Prosecutor's Office is charged with the detection, apprehension and prosecution of all violations of New Jersey criminal laws within Union County. Respondent's ultimate superior in the office is petitioner John Stamler, the Prosecutor of Union County. Prosecutor Stamler was appointed to this position for his third

five year term by Governor Thomas Kean in 1988 and is the highest law enforcement official in the county. Petitioner Edmund Tucker is the First Assistant Prosecutor in that office. Petitioner Richard Rodbart serves as its Trial Supervisor, supervising the conduct of all trials in which the office is involved. Petitioner Patrick Maloney is the Chief of Investigations, and is the highest ranking police official in the office. All petitioners, defendants below, were and remain Zamboni's immediate supervisors in the prosecutor's office (25a).

On April 15, 1985, Zamboni filed suit in federal district court, alleging that in response to his articulated opposition to a personnel reorganization of the detective bureau which adversely affected him, the prosecutor subjected respondent to a series of petty, vindictive and improper disciplinary actions: The other individually named petitioners were alleged to have effectuated several of these retaliatory disciplinary actions at the prosecutor's behest, or, in some instances, requested their imposition. To rectify this allegedly wrongful conduct, respondent sought relief under 42 U.S.C. § 1983, seeking compensatory and punitive damages for the alleged violation of his rights to due process and free speech pursuant to the First and Fourteenth Amendments, and requesting injunctive relief to prohibit such conduct in the future. Respondent's amended complaint added various pendant state law claims (6a).

Because this case finds its genesis and development in a personnel dispute between respondent and the prosecutor's office, a brief review of the structure of that office is necessary. N.J. Stat. Ann. 2A:157-1 *et seq.* vests in each county prosecutor the authority to appoint both county detectives and county investigators. The Union County Prosecutor's Office employs a large number of individuals in both positions. The powers and duties of each position are identical; they differ only because detective positions are in the classified civil service while

investigator positions are in the unclassified civil service. Pursuant to the New Jersey Civil Service Act, N.J. Stat. Ann. 11:-1 *et seq.*,[1] appointments in the classified service generally are made pursuant to certified lists of eligible candidates which are issued by the Department of Civil Service after written examinations are offered. An appointing authority such as the prosecutor must then select from among the top three eligibles who are certified on the list. Appointments and promotions in the unclassified service, although entitled to various protections enjoyed by New Jersey public employees, generally are determined and made in the public employer's discretion. Successful candidates are selected from the pool of eligibles who meet the minimum qualifications for the job. Individuals appointed to a position in the unclassified service serve at the public employer's pleasure, subject to a variety of procedural protections contained in the Act. Accordingly, because county investigator positions are in the unclassified service, the prosecutor has a greater degree of control over their appointment and removal (31a).

In or about November 1982, Prosecutor Stamler decided to reorganize the structure of the detective bureau of the Union County Prosecutor's Office.[2] Under his proposed plan, any new promotions to superior officer positions for law enforcement personnel in the office would be made from the ranks of unclassified investigators. In order to obtain a promotion, a detective such as Zamboni needed to request a leave of absence

---

1. The New Jersey Civil Service Act has been revised since the institution of this suit and is now codified as N.J. Stat. Ann. 11a:1-1 *et seq.* The provisions are virtually identical.

2. The history and propriety of this reorganization is fully set forth in comprehensive opinions in *Zamboni v. Stamler,* 194 N.J. Super. 598, 447 A.2d 449 (Law Div. 1984), *aff'd,* 199 N.J. Super. 378, 489 A.2d 1169 (App. Div. 1985), in which respondent's state court litigation to invalidate the prosecutor's reorganization of the detective staff was rejected.

from his classified position and then seek an appointment in the higher ranks available among the unclassified investigator positions. The individual's job title and status would remain totally unchanged if he did not desire to participate in this plan.

This plan was announced by Prosecutor Stamler to his entire staff in or about late 1982. The procedures for promotion to the higher unclassified positions were also explained, and all investigative staff members who desired promotions were invited to apply. Zamboni, who was serving at that time as a lieutenant of detectives, advised the prosecutor of his desire to apply for a promotion. Accordingly, he specifically requested a leave of absence from his detective position to become an investigator in the unclassified service, and submitted himself to the application process in hopes of receiving a promotion under the new reorganization plan (4a).

In or about January 1983, Prosecutor Stamler decided upon the individuals to be selected for the limited number of available promotions. Respondent was not one of those selected, and the prosecutor privately advised Lieutenant Zamboni that he would not be promoted. Other applicants who were not selected for promotion were also advised in a similar manner. Shortly thereafter, Prosecutor Stamler formally announced 19 promotions which had been made pursuant to the reorganization plan, all of which became effective on March 1, 1983. *See Zamboni v. Stamler,* 194 N.J. Super. at 602, 447 A.2d 453 (1985).

Unhappy with the results of the reorganization plan because he was not promoted, Zamboni began to voice publicly his dissatisfaction with the reorganization, and his consequent failure to be promoted, both to co-workers and subsequently to administrative agencies. On March 8, 1983, respondent wrote a lengthy letter to the President of the New Jersey Civil Service Commission (on stationary with the prosecutor's letterhead)

complaining that he had been wrongfully denied a requested promotion, and was working "out of title", as a result of the personnel reorganization plan (55a-64a). Approximately two weeks later, on March 23, 1983, Zamboni reiterated these personal complaints about the reorganization by writing directly to Prosecutor Stamler (65a-68a). Still dissatisfied with the prosecutor's unwillingness to abandon his reorganization plan, Zamboni filed suit in the New Jersey Superior Court to contest the reorganization and his failure to be promoted. These complaints about the prosecutor's office reorganization and its ramifications upon Zamboni form the basis of his claim that he was improperly punished for exercising his First Amendment rights. A review of each of them makes clear that they were purely concerned with seeking personal redress for an adverse personnel determination made by Prosecutor Stamler.

Zamboni's March 8, 1983 letter to the Civil Service Commission makes clear that, in both the overall and specific thrust of its demands, its sole purpose was to rectify a personal employment situation which Zamboni felt was improper. The first sentence of his letter, for example, complains that the reorganization resulted in Zamboni working in ". . . non-conformance to the duties and responsibilities relating to job classifications set forth by the Civil Service Commission, by the appointing authority of the Union County Prosecutor's office" (55a). On page 3 of his letter, Zamboni objected to the fact that he "was summoned to Prosecutor Stamler's office and informed that I was not being promoted, and further, that I was being transferred to the trial unit, where I would be responsible for assisting those assistant prosecutors assigned to a specific criminal court in the Union County judicial system" (57a). On the next page, Zamboni complained further that, in both appearance and reality, his assignment to the trial unit of the Prosecutor's office was a "demotion" (59a). The letter continued with complaints that the promotional plan as implemented by the prosecutor

adversely affected Zamboni personally because he no longer was permitted to perform the identical duties he believed were appropriate under his civil service job description (62a). The letter concluded by claiming that the prosecutor, "by his action in transferring me to the trial unit, whatever the ostensible reason", adversely affected his right to perform the supervisory duties which he believed were mandated by his job title and classification (62a).

Zamboni's March 23, 1983 letter to Prosecutor Stamler again reiterated the purely personal nature of his complaints (65a). Indeed, the purpose of that correspondence was summarized in the first sentence, wherein Zamboni stated:

> "I am writing this letter as a protest against my recent assignment to the trial unit."

After cataloging the perceived unfair ramifications which the detective bureau reorganization had upon him, Zamboni concluded:

> "With this letter, I respectfully request an assignment to a command position in accordance with Civil Service class specification for a Lieutenant of County Detectives. I have consulted with private counsel, and at his suggestion, and in the interest of fairness and courtesy, we are affording you the opportunity to remedy this wrong (68a).

Zamboni's state court lawsuit (69a-72a) similarly sought judicial relief solely to rectify his personal circumstances when his barrage of correspondence and complaints about his failure to be promoted proved unavailing. The complaint alleged that the reorganization plan was unlawful because it "circumvented

established guidelines for the promotion of individuals in the classified service," and also claimed that the prosecutor had violated Zamboni's rights by "failing to promote the plaintiff and by transferring plaintiff to the trial unit . . . forcing the plaintiff to perform specific duties which are not within his classified title" (71a). In the prayer for relief, the complaint sought the following relief:

> "[P]romotion plan as instituted and implemented is unlawful; . . . that defendants' continued requirement that plaintiff work out of job title [be declared] unlawful; [that] defendants . . . cancel all promotions made under the newly implemented promotional plan; and . . . [that] defendants cease and desist in requiring the plaintiff to perform specific duties which are not within his classified title" (72a).

Not surprisingly, conflict developed between Zamboni and his superiors as a result of this expressed dissatisfaction. Within a few months, respondent became the subject of several minor disciplinary actions. This discipline is concededly defined as "minor" under applicable New Jersey law. N.J. Stat. Ann. 11:5-1; N.J.A.C. 4:1-17.7. Zamboni was neither terminated nor demoted from his position as a lieutenant of detectives. However, over the 2½ year period following his complaints about the personnel reorganization and his place in it, he received several written reprimands, a $100 fine, and a four day suspension. Petitioners have always contended that this was legitimate discipline, resulting from respondent's deteriorating job performance due to his dissatisfaction with his personal situation in the office. Respondent labels it retaliatory harassment. Although the parties have hotly contested whether respondent was the cause, or the victim, of the discipline of which he complains, all parties and the courts below assumed, for purposes of their summary judgment motion,

that all of these disciplinary actions about which Zamboni complained were in reprisal for his opposition to the reorganization plan and its ramifications upon him.

In a written opinion dated June 9, 1987, Honorable John Bissell, U.S.D.J. dismissed respondent's complaint and his central claim that such minor disciplinary actions were unconstitutional even if in retaliation for his letters and corollary state court lawsuit to invalidate the prosecutor's office reorganization (25a-54a). Relying upon *Connick v. Myers,* 461 U.S. 138, 183 S. Ct. 1684, 75 L. Ed. 2d 708 (1983), its progeny, and numerous circuit court decisions, the district court rejected respondent's central allegation that his complaints about the reorganization plan rose to the level of protected First Amendment activity:

> "In the instant case, the form, content and context of Mr. Zamboni's speech indicate that it too involves a 'quintessential employment beef'. . . . The record as a whole, explored above, reveals that plaintiff's primary motivation was to contest his failure to be promoted and his transfer to the trial unit. Mr. Zamboni's comments were not geared towards informing the public that the Union County Prosecutor's office was not properly discharging its functions or was violating Civil Service law. That is, like Ms. Myers in the *Connick* case, plaintiff Zamboni was not speaking as a citizen upon matters of public concern." (37a).[3]

The Court of Appeals for the Third Circuit reversed. While the court recognized the personal and subjective concerns expressed

---

3. The court also rejected Zamboni's due process claims and his pendant state law allegations. The court did not reach the petitioners' argument of immunity from suit in their individual capacities . . . because, in light of the court's other rulings, it was unnecessary to do so" (54a).

by Zamboni, noting that "[t]he thrust of Zamboni's speech related to his opposition to Stamler's reorganization plan and, in particular, to how promotions were to be made under that plan" (9a), it concluded that such personnel criticisms nonetheless implicate "significant" public interests. The court held that it had "repeatedly found that public employees' criticism of the internal operations of their places of public employment is a matter of public concern" (9a). The court of appeals noted that while ". . . Zamboni had a personal stake in the speech at issue" (10a), that was only one factor to be considered. No other explanation or analysis was offered, however, as support for its conclusion that personal complaints about an internal personnel reorganization in the prosecutor's office which adversely affected Zamboni rose to the level of "public concern."

Having concluded that Zamboni's expressed unhappiness with the prosecutor's promotional plan was a matter of "public concern" under *Connick*, the court of appeals approached the disruption prong of the *Connick* test. While claiming that the factual record was insufficiently developed in this regard, the court remanded the case with instructions that also blatantly disregard this Court's admonitions in *Connick*, and which effectively destroy the balancing test which was carefully crafted in that case. The court of appeals expressly rejected the prosecutor's claim that a finding of potential or probable disruption of his office as a result of employee criticism by a high-ranking member of his staff would outweigh the employee's First Amendment rights (12a). Instead, the court held that a public employee's speech must cause "actual disruption" (12a) before it may be the subject of disciplinary sanctions. Further compounding this error, the court of appeals opined that even "actual disruption" would be insufficient, from a constitutional standpoint, to override purportedly protected speech, if the prosecutor's actions helped

trigger the disruption (13a).[4]

Petitioners submit that the decision of the court of appeals constitutes a misapplication and radical revision of this Court's teaching in *Connick*, and effectively eliminates any protection which public employers, and particularly county prosecutors, must enjoy to preclude the conversion of their offices into constitutional forums for resolution of labor relations matters. In its purported application of this Court's admonitions in *Connick*, the court of appeals erred grievously on several levels. First it expands the definition of matters of "public concern" beyond recognition by defining such issues in a manner which encompasses virtually any topic, however personal, so long as some policy consideration is spontaneously invoked or belatedly created. The ruling effectively eviscerates this Court's teachings and confers virtually complete protection and insulation for employee criticism of the internal operations of a prosecutor's office, so long as the complaints are appended to some purported policy consideration which supports the employee's personal contentions. Second, even if a matter of public concern is implicated, the court's balancing test is remarkably skewed by requiring "actual disruption" to occur before responsive action to quell potential disruption may be taken. In this regard, the court fails to consider any of the other factors, such as the nature and extent of the discipline which was imposed, in weighing these competing considerations.

Accordingly, petitioners respectfully request that this Court

---

4. Despite its recognition that none of the discipline which Zamboni suffered rose beyond a 4 day suspension, the court also refused to "cut off at the pass" (19a) Zamboni's attempt to prove that alleged retaliatory discipline which fell short of discharge or serious penalty was nonetheless cognizable as a violation of New Jersey public policy, or, inferentially, this Court's articulation of the appropriate First Amendment test for protected speech. The court accordingly permitted this state law aspect of his complaint to proceed to jury determination as well.

should issue a writ of certiorari and weigh and consider the opinion of the court below.

REASONS FOR GRANTING THE WRIT

I.

THE COURT SHOULD GRANT THE PETITION FOR CERTIORARI BECAUSE THE DECISION OF THE COURT OF APPEALS CONSTITUTES A RADICAL DEPARTURE FROM THE COURT'S SETTLED RULES CONCERNING CRITICISM OF PERSONNEL DECISIONS IN A PROSECUTOR'S OFFICE, AND REPRESENTS A SIGNIFICANT DEPARTURE FROM DECISIONS OF THE COURTS OF APPEALS OF OTHER CIRCUITS ON THIS ISSUE.

This case presents this Court with the opportunity to correct an erroneous legal, and virtually impossible factual, standard which the court below held must be satisfied before insistent and vituperative complaints about a prosecutor's office reorganization by a disgruntled, high-ranking staff member may be the subject of responsive disciplinary action. Under the theory and analysis of the court of appeals, virtually any complaint by an employee about the internal operation of the governmental agency for which he works inevitably implicates matters of "public concern" triggering First Amendment protections. The court of appeals finds virtually irrelevant both the personal motivations of the employee whose speech is contested, and the lack of interest by the public in such speech. By paying mere lip service to the consistent admonition of *Connick v. Myers* and its progeny that governmental employers, and particularly prosecutors, need not permit the conversion of their offices into roundtable forums for extended criticisms by disaffected employees concerning personnel decisions they dislike, while concomitantly eviscerating the theory's

analytical support and doctrinal basis, the court of appeals has radically redefined the nature, extent and very concept of those matters of public import worthy of constitutional protection. In so doing, its decision in this case is at odds with consistent teachings of this Court and virtually every circuit court which has considered the issue.

Petitioners respectfully submit that the decision of the Third Circuit demands review to insure that the carefully crafted balance of interests mandated by *Connick* is not destroyed by an open-ended invitation to accord constitutional protection to virtually every personnel dispute articulated by disgruntled employees in a public office. The court of appeals' analysis, if undisturbed, will effectively destroy any ability enjoyed by public employers, particularly those charged with operating para-military organizations such as a prosecutor's office, to control the degree and extent of criticism of disputed personnel decisions. Whether deliberately or as an unintended by-product of its analysis, the opinion of the court below will inevitably confer upon public employees the right and ability to convert every disagreement with their superiors into personnel disputes of constitutional dimension.

The analytical touchstone for this case is *Connick v. Myers*. There this Court described the appropriate test for determining whether constitutional protection must be afforded to a public employees' speech:

> "When a public employee speaks not as a citizen upon matters only of public concern, but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior." *Id.* at 720.

Having thus framed the issue, the Court proceeded to analyze whether the questionanaire prepared and distributed by the disgruntled assistant prosecutor implicated issues of public concern, noting that "whether an employee's speech addresses a matter of public concern must be determined by the content, form and context of a given statement, as revealed by the full record", *id.* at 147-148. The Court concluded that Myers' questionnaire was not protected speech. This Court saw the questionnaire and its distribution as a "mere extension of Myers' dispute over her transfer", an issue which was of little, if any, interest to the public generally. Accordingly, the Court determined that plaintiff's actions simply reflected "one employee's dissatisfaction with a transfer and an attempt to turn that displeasure into a *cause celebre.*" *Id.* at 148.

So too here. The content, form and context of Zamboni's complaints are virtually indistinguishable from the personnel disputes articulated in *Connick*. Yet in reviewing Zamboni's claims of constitutional protection for his complaints about the prosecutor's reorganization, the court of appeals rejected the district court's appropriate conclusion that Zamboni's expressed complaints were properly characterized as a "quintessential employee beef" lacking constitutional protection. The court of appeals virtually ignored the fact that Zamboni's letters, complaints and lawsuit obviously had a singular purpose — to invalidate a promotional plan which was adverse to him.

Like the assistant district attorney in *Connick*, Zamboni did not seek to inform the public that the prosecutor's office was not discharging its governmental responsibilities in the prosecutions of criminal cases. He did not purport to expose criminal wrongdoing or a breach of public trust by petitioners. Nor did he raise questions of competence, fiscal integrity or impartial administration of the criminal laws in Union County. The general

citizenry would not be remotely interested, let alone seriously concerned, that Prosecutor Stamler had decided to implement an alternative statutory procedure for the promotion of superior law enforcement positions in his office. All of Zamboni's complaints amounted to nothing more than his articulated unhappiness with his failure to be promoted, and his dissatisfaction with his resulting job responsibilities in the office. As *Connick* and its progeny have repeatedly noted, the majestic purposes which undergird the First Amendment are trivialized if such routine personnel disagreements are elevated to issues of constitutional dimension requiring federal intervention and adjudication.

Without virtually any consideration of these precepts, however, the court of appeals dismissed these fatal deficiencies in Zamboni's claim and elevated them to First Amendment protection with the following statement:

> "The thrust of Zamboni's speech related to his opposition to Stamler's reorganization plan and, in particular, to how promotions were to be made under that plan. That opposition raised significant issues concerning, *inter alia*, whether the county prosecutor had impermissibly circumvented the civil service laws, the role of civil service employees in the county prosecutor's office, and the manner in which the county prosecutor, the county's highest law enforcement official, performed his administrative function" (9a).

The problem with the court of appeals' conversion of Zamboni's personnel dispute from the mundane to the majestic is obvious. The fact that some weightier policy considerations may be envisioned or retroactively conjured up in the context of an office reorganization cannot convert such personal employment disagreements into issues of public import. The analysis and dissection of employee speech which is required to determine

whether it rises to a level of constitutional protection cannot be effectuated by such a superficial and conclusory statement. Simply stated, Zamboni's personal unhappiness with his office situation cannot be converted into a matter of public concern because it took place against the backdrop of a civil service employer, and the imposition of discipline upon him for such statements or actions is accordingly not prohibited by the First Amendment. As stated by this Court in *Connick* at 146:

> "When employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment."

Similarly, while the court of appeals grudgingly conceded that an employee's personal motivation for his speech is at least one factor to be considered in the mix of *Connick* criteria to be evaluated, the fact that it was minimized by that court into virtual non-existence placed the Third Circuit in conflict with other circuit courts which have considered the issue. In *Fiorillo v. Department of Justice,* 795 F.2d 1544, 1550 (Fed. Cir. 1986), the court of appeals, rejecting an employee's claim that his speech was protected, ruled that in determining whether speech is protected under *Connick*, "the *primary* motivation of the employee must be the desire to inform the public on matters of public concern." (Emphasis in original.) *Accord, Linhardt v. Gladfelter,* 771 F.2d 1004 (7th Cir. 1985); (court must determine the "point" of the speech). Subsequent efforts to portray the ventilation of office disagreements as simultaneously raising matters of public concern cannot elevate the speech to constitutionally protected status.

Murray v. Gardner, 741 F.2d 434 (D.C. Cir. 1984), *cert. denied,* 470 U.S. 1050 (1985), also illustrates the proper judicial

resolution by other courts of appeals of virtually identical claims. Murray was an agent for the FBI who opposed an office furlough plan, attacking it as illogical, arbitrary and capricious. He voiced these complaints at a conference conducted by employees and superiors to discuss the proposals. Shortly thereafter, Murray was suspended for 14 days and placed on probation for six months. His suit alleging unconstitutional retaliation for opposing the furlough plan followed.

Like Zamboni, Murray claimed that his opposition to the FBI personnel reorganization concommitantly implicated matters of public concern because it inevitably involved disposition of public funds and the quality of the workforce. Citing the test utilized by the Ninth Circuit in *McKinley v. City of Eloy*, 705 F.2d 1110, 1114 (9th Cir. 1983), the *Murray* court rejected both claims. It noted that:

> ". . . speech by public employees may be characterized as not of 'public concern' when it is clear that such speech deals with individual personnel disputes and grievances and that the information would be of no relevance to the public's evaluation of the performance of governmental agencies." *Id.* at 438.

Noting that plaintiff's remarks "appear to be an example of the quintessential employee beef: management has acted incompetently . . . " *id.* at 438, the court concluded that plaintiff's speech did not remotely qualify for First Amendment protection under the *Connick* test. Similarly, the court held that mere recitation that the contested personnel decision adversely affected the public fisc could not transform such private disputes into matters of public concern. It noted:

> "If *Connick's* rule could be bypassed by arguments that plaintiff raises — that public monies and

> governmental efficiency are involved — *Connick* would stand for nothing." *Id.* at 438.

Altman v. Hurst, 734 F.2d 1240 (7th Cir. 1984), similarly demonstrates the aberrance of the Third Circuit's decision. Like this case, *Altman* also involved a law enforcement officer. Because Altman had encouraged another police officer to appeal a suspension, he was publicly humiliated and harassed by his supervisors. When he filed suit to stop this harassment, the defendants admittedly increased their retaliatory campaign, reassigning plaintiff to foot duty, denying his overtime opportunities, and rescheduling his vacation time.

The Seventh Circuit concluded that, even if all of these actions were taken in direct response to plaintiff's initial advice that a fellow officer file a grievance, and his subsequently filed litigation to terminate the police chief's retaliatory harassment, "it does not follow that those comments are protected by the First Amendment." *Id.* at 1243. Concluding that all of plaintiff's actions and statements really concerned a "private personnel" dispute, *id.* at 1244, the court dismissed the complaint in reliance upon the *Connick* rule.

Indeed, the overwhelming majority of cases decided by the various courts of appeal have been consistent in rejecting an employee's efforts to prevent public employer discipline triggered by employee speech on a private personnel matter. *See Sipes v. United States,* 744 F.2d 1418, 1423 (10th Cir. 1984) (complaint concerning uneven application of discipline does not involve a matter of public concern); *Calaway v. Hafeman,* 832 F.2d 414 (7th Cir. 1987) (complaints about private sexual harassment not a matter of public concern); *Linhardt v. Glatfelter,* 771 F.2d 1004 (7th Cir. 1985) (encouragement of fellow employee's grievance not a matter of public concern); *Yoggurst v. Stewart,* 739 F.2d 293 (7th Cir. 1984) (comments about possible termination of

superior not a matter of public concern); *Renfroe v. Kirkpatrick*, 722 F.2d 714 (11th Cir. 1984), *cert. denied*, 105 S. Ct. 98 (1988)(teacher's grievance concerning part-time assignment is not a matter of public concern); *Davis v. West Community Hospital*, 755 F.2d 455 (5th Cir. 1985) (comments about patient care in a public hospital are not a matter of public concern).

Moreover, contrary to the opinion of the court below that it has "repeatedly found that public employees' criticism of the internal operations of their places of public employment is a matter of public concern" (9a), this case substantially expands traditional analysis of matters allegedly of public concern even within the Third Circuit. Thus, in *Rode v. Dellarciprete*, 845 F.2d 1195 (3rd Cir. 1988), the court reversed the discharge of a secretary who gave an interview to a newspaper reporter concerning pervasive racial discrimination in the Pennsylvania State Police. This issue had already been widely reported in the media and had been the subject of several very public inquiries and reports by the state legislature. Surely these concerns of wholesale violations of our civil rights laws raised issues qualitatively different than whether prosecutorial promotions in Union County were made from the investigative rather than detective staff. *Accord, Trotman v. Board of Trustees of Lincoln University*, 635 F.2d 216 (3rd Cir. 1980).

The Third Circuit's decision in *Czurlanis v. Albanese*, 721 F.2d 98 (3rd Cir. 1983) also involved very different facts. There a mechanic for the county publicly stated at a Board of Freeholders meeting that there was fiscal mismanagement, waste and fraud in the department where he worked. The employee's complaints, moreover, were neither triggered nor accompanied by any adverse personnel determination or disappointment he had suffered while a county employee. Again, the difference between the airing of governmental fraud at a public meeting and complaints about internal promotional mechanisms could not be more glaring. *Czurlanis* met the *Connick* test; Zamboni surely does not.

Viewed both facially and from the perspective of context, form and content mandated by *Connick*, therefore, it is apparent that the issues about which Zamboni complained fall far short of raising serious public concerns worthy of First Amendment protection. His complaints raised garden variety employee gripes which had never enjoyed constitutional protections before this case. His letters are replete, indeed obsessed, with references to his personal dissatisfaction with the prosecutor's reorganization and its ramifications upon his career. His suit to invalidate the reorganization similarly raised and sought only personal relief for a concededly disgruntled employee. Neither his letters nor lawsuit sought to inform the public about issues transcending his individual circumstances; he certainly did not write or act on behalf of a class of employees. It is difficult to understand how the court below could ignore that all of his actions and efforts were solely geared towards contesting the adverse ramifications which the reorganization had upon him. He was simply ventilating his unhappiness with a personnel reorganization which was thwarting his interests in upward mobility in the prosecutor's office.

The effort by the court of appeals to transform Zamboni's complaints about the mundane and ministerial reorganization of prosecutorial personnel into an issue of political or social magnitude transcending his personal circumstances is surely disingenuous for other reasons as well. The court's claim that Zamboni raised "significant issues concerning whether the county prosecutor had impermissibly circumvented the civil service laws, the role of civil service employees in the county prosecutor's office, and the manner in which the county prosecutor. . . performed his administration functions" (9a), is simply incorrect as a matter of both fact and law. Incorrect factually because this perceived violation of civil service requirements rather served only as Zamboni's argumentative predicate for claiming the treatment he received was improper. Incorrect legally because there was not, even from respondent's perspective, any abolition of civil service

merit and fitness requirements under the prosecutor's reorganization. That plan simply involved selection of promotional candidates from the unclassified rather than classified component of Civil Service. Appointments and promotions in the unclassified civil service are an explicit and traditional method in New Jersey for filling public sector positions. The reorganization was well within the recognized and traditional promotional process for other high ranking positions requiring a high degree of loyalty and confidence by the prosecutor. It is undisputed that all assistant prosecutors and investigator positions in the prosecutor's office were already in the *unclassified* service. The reorganization plan simply assured that superior officer positions in that office, whether detective or investigator, would be similarly appointed. For this reason, the Third Circuit's decision smacks of a retrospective rationalization designed to bootstrap Zamboni's mundane personnel dispute into a matter of constitutional dimension.

The import of the Third Circuit decision, and its consequent error, is clear. It stands as an aberrant and improper analysis of this Court's teachings in *Connick* and its application by virtually every court in the United States. Complaints about governmental personnel decisions, no matter how minor or personal, may now be the subject of federal constitutional review and appeal so long as they can be appended to some weightier policy concern which exists only in the abstract, and which was never even remotely implicated by the employee at the time of his speech. Neither *Connick*, nor the constitutional underpininings for that decision, ever intended to trivialize constitutional doctrine with personnel minutiae, or elevate mundane personnel matters to the level of First Amendment doctrine. Yet the court of appeals decision not only invites, it virtually mandates, the conclusion that federal courts must be prepared to serve as labor arbitration forums whenever employee criticism of personnel decisions is implicated by public employer discipline. Accordingly, petitioners respectfully

submit that this Court should issue a writ of certiorari to review and correct the erroneous and dangerous precedent created by the decision below.

II.

EVEN IF ZAMBONI'S OPPOSITION TO THE OFFICE REORGANIZATION IMPLICATED A MATTER OF PUBLIC CONCERN, THAT INTEREST WAS OUTWEIGHED BY THE PROSECUTOR'S COMPELLING NEED TO MAINTAIN ORDER IN HIS OFFICE, AND THE COURT OF APPEALS CREATED AN ERRONEOUS LEGAL STANDARD IN REQUIRING ACTUAL DISRUPTION BEFORE RESPONSIVE DISCIPLINARY ACTION MAY BE TAKEN.

Even assuming, *arguendo*, that all, or even a portion of, Zamboni's speech in opposing the prosecutor's office reorganization touched upon a matter of public concern, the necessary inquiry for determining whether the speech enjoyed First Amendment protection was far from over. Yet the court of appeals dispensed with virtually any analysis of competing interests after its findings that the office reorganization was a matter of public concern, and instead created an erroneous and ultimately untenable legal standard for weighing such counterveiling interests.

It is settled that the right to criticize personnel policies in a governmental office is a function of a number of factors to be balanced by the court in making its final determination. *Connick v. Myers, supra.* The issue turns upon whether the employer's interests in an efficient and harmonious workforce outweigh the employee's interests in expressing himself on matters which are allegedly of public concern. *Pickering v. Board of Education,* 391 U.S. 563, 20 L. Ed. 2d 811, 88 S. Ct. 1731 (1968). As might be expected, such determinations cannot be made in a vacuum. It is critically important to analyze the employment setting in which the controversy arises, the nature of the employee's expression and the severity of the discipline imposed. As this Court stated in *Connick*:

> ". . . the State's burden in justifying a particular discharge varies depending upon the nature of the employee's expression . . . The *Pickering* balance requires full consideration of the goverment's interest in the effective and efficient fulfillment of its responsibilities to the public." *Connick* at 150.

The court of appeals, contrary to this Court's repeated instructions, misstated and misapplied the critical issues for purposes of proper *Connick* analysis. Virtually ignoring the critical mix of factors which this Court and other courts of appeal have held must be evaluated, such as the manner and context of Zamboni's speech, his relative rank within the hierarchy of the prosecutor's office, the trust the prosecutor must repose in persons of such rank, and the nature and degree of severity of the contested discipline, the court of appeals remanded the matter for additional hearings before the district court on a single issue — whether Zamboni's activities "actually disrupted" the prosecutor's office, and if so whether that disruption was "so severe" that it overrode Zamboni's First Amendment rights (12a). *Compare Rankin v. McPherson,* ____ U.S. ____, 97 L. Ed. 2d 315, 107 S. Ct. 2891 (1987). By ignoring settled doctrine in this area, or at least radically revising the appropriate balancing tests mandated by *Connick* and its progeny, the court of appeals has placed virtually insurmountable obstacles in the way of regulation of vituperative and insistent criticism of personnel decisions by sworn officers in the setting of a prosecutor's office.

The glaring error by the court below is best exemplified by the following legal standard it enunciated for the balance of competing interests:

> ". . . we reject Stamler's suggestion . . . that a finding of potential disruption could be sufficient

> to outweigh Zamboni's interests. To the contrary, in cases such as this involving speech on matters of significant public concern, a showing of actual disruption is required." (12a) (emphasis in original).

Of course this standard runs directly contrary to the test which this Court enunciated in *Connick* at 152.

> ". . . we do not see the necessity for an employer to allow events to unfold to the extent where the disruption of the office and the destruction of working relationships is manifest before taking stronger action."

Obviously, if an employee must be permitted to actually disrupt a prosecutor's office before disciplinary action may be taken for vituperative and unrelenting criticism of personnel decisions, the salutary policy considerations which undergird the *Connick* doctrine will be totally eviscerated. Yet that is precisely the test required by the court of appeals in the decision below.

Petitioners submit that the court of appeals grievously erred in this formulation. The proper analysis of whether the prosecutor's need for efficiency and loyalty in his office outweighs the purported exercise of First Amendment rights requires a substantially broader spectrum of considerations than those articulated by the court of appeals through its relentless emphasis upon "actual disruption" of the office. Probable or likely disruption is a far more appropriate consideration. The nature of the expression, its form, content and context, also are all important factors in analyzing the competing interests involved. Clearly, moreover, the severity of the discipline at issue is also a critical factor, since the employee's interest in unrestricted speech is at its zenith when the discipline is severe, and must diminish

on the continuum when the penalty is minor. *Rankin v. McPherson, supra.* Here, the minimal nature of the discipline suffered, the limited public interest in Zamboni's speech, the contentious words and actions which triggered the prosecutor's response, the likelihood of disruption and the para-military nature of a prosecutor's office all strongly suggest that the court of appeals erred in its articulation of the proper balancing test and its application to the facts of this case.

An employer's interest in maintaining discipline and loyalty in the workforce is of the highest importance when the agency involved is charged with law enforcement. *McMullen v. Carson,* 754 F.2d 938 (11th Cir. 1985). Indeed, as noted in *Connick*, these interests reach their apex when the agency involved is a prosecutor or district attorney's office charged with the enforcement of the criminal laws of a state. *Sprague v. Fitzpatrick,* 546 F.2d 560 (3rd Cir. 1976); *Owens v. City of Derby,* 586 F. Supp. 36 (D.C. Cir. 1984); *Murray v. Gardner,* 741 F.2d 434 (D.C. Cir. 1984). As this Court wisely acknowledged in *Connick*, 'it is important to the efficient and successful operation of the district attorney's office for assistants to maintain close working relationship with their superiors'' *id.* at 152.

Indeed, in *Sprague v. Fitzpatrick, supra,* the Third Circuit Court of Appeals itself recognized as essential the trust and loyalty which must exist between a prosecutor and his immediate staff. There the court recognized that while the criticism of the district attorney concerned a matter of grave public concern, a prosecutor's interest in an efficiently run office, and in the confidence of his subordinates, is absolutely essential to the efficient operation of such an agency. It also outweighs the employee's right to express himself, even on matters of significant public concern, in such a setting.

''We could not expect the district attorney to run

> an efficient office if his first assistant were free to impugn his integrity in public." *Id.* at 565.

Why the court of appeals failed to hold a lieutenant of detectives in Prosecutor Stamler's office to a similarly exacting standard is baffling. It is undisputed that Zamboni's March 8, 1983 letter to the President of the New Jersey Civil Service Commission (the triggering event for this suit) is replete with vitriolic hyperbole which directly attacks the integrity of respondent's superior and the highest law enforcement official in Union County. The letter contains numerous unflattering and defamatory statements directed at Prosecutor Stamler. For example, Zamboni's correspondence alleged that the Prosecutor had "an egotistical mentality and vindictive personality", that the prosecutor is a "hypocrite", that his personality is "deceptive" and that he is a "liar" (61a). While the court of appeals apparently felt compelled to encourage protection of such speech, claiming it encourages "healthy" and robust debate, this language has precisely "the *potential* for undermining office relations" (emphasis supplied) which this Court condemned in *Connick* at 723. As in *Connick,* Prosecutor Stamler should not be required to let his office degenerate into confrontation and actual disruption before prophylactic responsive action is taken. The court of appeals' test for "actual disruption" of the office, however, mandates just such administrative paralysis.

Nor should the court of appeals have denied the substantial importance of Zamboni's position in the prosecutor's office, and the need for a close and trusting relationship with his superiors. As a lieutenant of detectives, there are few law enforcement positions of higher rank in the prosecutor's office. Zamboni was more than a mere police officer; he is a ranking superior officer in the agency with the ultimate responsibility for enforcing the criminal laws in Union County. Surely this Court can take notice of the substantial distinction of Zamboni's responsibilities from

the clerical duties of the employee in *Rankin v. McPherson, supra.* In short, he is surely an employee with sufficient importance and responsibility in the prosecutor's office to warrant the need for absolute trust and confidence between himself, the prosecutor and the other superiors who are petitioners in this case. It goes without saying that Zamboni's words and actions destroyed that necessary relationship.

The context in which the speech at issue arises is the final factor to be analyzed in the *Connick* balancing test. ("When an employee's speech concerning office policy arises from an employment dispute concerning the very application of that policy to the speaker, additional weight must be given to the supervisor's view that the employee has threatened the authority of the employer to run the office.") *Connick* at 153. As noted above, Zamboni's complaints were almost exclusively concerned with his disagreement with the application of the new promotional policy to himself. As in *Connick, Murray,* and *Davis*, this case "is most accurately characterized as an employee grievance concerning internal office policies". *Connick* at 724. By his own admission, respondent's basic concern was in overturning or modifying a plan for reorganization of personnel in the office which directly affected him, and with which he was disenchanted. His letters to the Civil Service Commission and his state court suit were solely directed and aimed at increasing his opportunities for upward mobility within the Union County Prosecutor's Office. Even if Zamboni's speech can be characterized as raising matters of public concern, however limited, under *Connick* the scales weigh far more heavily in favor of petitioners than the court of appeals acknowledged.

Finally, it is critical to recognize that the "discipline" Zamboni suffered (several reprimands, $100 fine and four day suspension) not only pales in comparison to the *discharges* imposed in similar cases in response to speech by a public employee (and

which was nonetheless deemed lawful) but was also triggered by undisputed conduct by Zamboni which must be deemed inappropriate in the context of a law enforcement agency. *Pickering v. Board of Education, supra; see also, Mt. Healthy City School District Board of Education v. Doyle,* 429 U.S. 274, 50 L. Ed. 2d 471, 97 S. Ct. 568 (1977). Simply stated, there should have been no doubt that Zamboni's speech and activities justified the minimal disciplinary responses he received from the prosecutor's office. Indeed, one may question the lenient treatment he received for his conceded acts of disloyalty and impropriety when viewed in the context of the far more severe disciplinary actions, including discharge, which have uniformly been upheld by the courts in similar settings. Zamboni's vitriolic and public characterization of the prosecutor as a "liar" and "hypocrite", his stony silence in the presence of others when the prosecutor attempted to exchange morning pleasantries with him, his reference to the prosecutor as "your boss" to an assistant prosecutor and concomitant implication that the prosecutor was not also Zamboni's superior, his repeated failures to follow the chain of command within the office, and his acts of insubordination such as refusal to sign for documents distributed to him certainly mandated some form of disciplinary action if order is to be maintained, and loyalty to be encouraged, in the Union County Prosecutor's Office. Surely his words and deed were far more inflammatory than the activities which this Court held to justify the *termination* of the assistant district attorney in *Connick* despite the assistant district attorney's more even-tempered commentary. Yet under the court of appeals' analysis, even letters of reprimand for such conduct will not be constitutionally countenanced.

The total failure of the court of appeals to even consider, let alone properly weigh, each of these concerns in determining whether Zamboni's purported rights of free speech were properly curtailed by petitioners compels this Court to issue the requested

writ to correct the errors of the court below. If *Connick* and its progeny are to retain any importance and vitality for law enforcement officials charged with the enforcement of criminal prosecutions in jurisdictions within the Third Circuit, this Court's review and correction of the errors by the Third Circuit is critical.

CONCLUSION

For all of the foregoing reasons, therefore, petitioners respectfully pray that a writ of certiorari should issue to review the opinion and judgment ot the Court of Appeals for the Third Circuit.

Respectfully submitted,

JAMES R. ZAZZALI

ROBERT A. FAGELLA

ZAZZALI, ZAZZALI, FAGELLA
& NOWAK
Attorneys for Petitioners

Dated: August 12, 1988

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED MAY 17, 1988

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 87-5397

JOHN N. ZAMBONI,

Appellant

v.

JOHN H. STAMLER, PROSECUTOR OF UNION COUNTY , and individually; PATRICK J. MALONEY, CHIEF OF INVESTIGATIONS FOR THE UNION COUNTY PROSECUTOR'S OFFICE and individually; RICHARD P. RODBART, TRIAL SUPERVISOR FOR THE UNION COUNTY PROSECUTOR'S OFFICE and individually; EDMUND J. TUCKER, FIRST ASSISTANT PROSECUTOR OF UNION COUNTY and individually; COUNTY OF UNION; UNION COUNTY PROSECUTOR'S OFFICE

Appeal from the United States District Court
for the District of New Jersey
(D.C. Civil No. 85-1748)

Argued December 17, 1987

Before: GIBBONS, *Chief Judge*, SLOVITER, and COWEN, *Circuit Judges*

(Opinion filed May 17, 1988)

Appendix A

PATRICIA BREUNINGER (Argued)
CAROL KENYON
Breuninger, Hansen & Casale
Fanwood, New Jersey 07023

Attorneys for Appellant

JAMES P. ZAZZALI
ROBERT A. FAGELLA (Argued)
CHRISTOPHER L. LEAVEY
Zazzali, Zazzali & Kroll
Newark, New Jersey 07102

Attorneys for Appellees

OPINION OF THE COURT

SLOVITER, *Circuit Judge*.

John N. Zamboni, a detective in the Union County Prosecutor's Office, filed suit under 42 U.S.C. § 1983 against the Union County Prosecutor and others alleging that they had taken various disciplinary actions against him in retaliation for his expression of opposition to changes in certain personnel policies and procedures in the prosecutor's office. Zamboni claimed that the retaliation violated his First Amendment rights. The district court granted the defendants' motion for summary judgment and dismissed Zamboni's complaint on the ground that Zamboni's expressions were not on a matter of public concern and hence were outside the ambit of First Amendment protection. The court also dismissed Zamboni's pendent claims under state law. The issues on appeal require us to consider both the First Amendment rights of public employees and the parameters of the New Jersey common law torts of wrongful discharge and intentional infliction of emotional distress.

Appendix A

I.

Facts

John N. Zamboni is a detective with the rank of lieutenant in the Union County Prosecutor's Office, where he has been employed for over twenty years. Defendant John H. Stamler is the Prosecutor of Union County and is the highest law enforcement officer in Union County.

The organization of the investigative staff of the Union County Prosecutor's Office is governed by the New Jersey County Detectives and County Investigators Act, N.J. Stat. Ann. §§ 2A:157-1 *et seq.* (West 1985) (the Act). The Act contemplates two categories of investigative officers, detectives and investigators, who perform essentially the same duties. *Compare id.* § 2A:157-2 *with id.* § 2A:157-10. The Act specifies the number, title, and salaries of superior officers within the detective ranks, *id.* §§ 2A:157-3 to -9, but is silent as to superior officers within the investigative class.

Detectives are in the classified branch of the civil service, *id.* § 2A:157-2, and, therefore, their appointment and promotion must be "made according to merit and fitness to be ascertained, as far as practicable, by examination." N.J. Const. art. VII, § 1, para. 2; *see also* New Jersey Civil Service Act, N.J. Stat. Ann. §§ 11:1-1 *et seq.* (West 1976) (the then applicable civil service provisions for appointment, promotion, termination, and working conditions of civil servants).[1] Investigators, on the other hand, are not in the classified civil service; their appointment and promotion is within the sole discretion of the prosecutor who may, for example, remove an

1. The New Jersey Civil Service Act, codified at N.J. Stat. Ann. §§ 11:1-1 *et seq.* (West 1976), was repealed, in large part, effective September 25, 1986, at which time the provisions of N.J. Stat. Ann. §§ 11A:1-1 *et seq.* became effective.

investigator at any time and for any reason. *See* N.J. Stat. Ann § 2A:157-10; *Muccio v. Cronin*, 135 N.J. Super. 315, 343 A.2d 158 (Law Div. 1975).

In late 1982, Stamler announced his intention to reorganize the prosecutor's office. Promotions thereafter would be made only from among the unclassified investigators. Superior officer positions within the investigator branch would be established to parallel those statutorily designated in the detective branch. Any detective who sought a promotion was instructed to take a leave of absence from the classified service, request a change in job classification to county investigator, join the investigators' staff, and then seek a promotion in the newly-established superior ranks of the investigator staff. If not so promoted, s/he could return to the classified service at the expiration of the leave of absence.

In compliance with the reorganization plan and in hopes of being promoted, Zamboni, like many of the other detectives in the prosecutor's office, requested both a leave of absence from his position as lieutenant of detectives and an appointment as lieutenant of investigators. He contends that at this time he also expressed his dissatisfaction with the plan to Stamler in a private meeting.

Nineteen investigators in the prosecutor's office, but not Zamboni, were promoted effective March 1, 1983 pursuant to the new procedure. Zamboni, retaining his rank of lieutenant, was transferred from a supervisory position as Commander of the Welfare Fraud Unit to a non-supervisory position in the Trial Unit, where he was responsible for helping assistant prosecutors prepare for trial by serving subpoenas and arranging for witnesses to appear.

The New Jersey Department of Civil Service describes the duties of a lieutenant of detectives as including the "supervis[ion of] a number of county detectives and investigators." App. at 155. Upon his

transfer, Zamboni wrote a letter to Stamler requesting an assignment to a position with supervisory authority. He also began publicly to criticize Stamler's reorganization plan. First, he wrote a six-page letter to the Civil Service Commission dated March 8, 1983 which began: "I would like to bring to your attention a situation involving non-conformance to the duties and responsibilities relating to job classification as set forth by the Civil Service Commission." App. at 76. Zamboni complained about, *inter alia*, "the prosecutor's purposeful attempt to subvert the Civil Service System and carry out his own plans, without regard to the law," App. at 80, and Zamboni's own transfer to the Trial Unit, which he claimed was an "abuse of Civil Service Regulations concerning the assignment of work according to Title and Classification" in that he was working without supervisory duties and therefore out of title. App. at 81.

The Civil Service Commission's initial determination was unfavorable to Zamboni. Zamboni appealed that determination to the Division of Appellate Practices and Labor Relations of the Department of Civil Service in another letter dated August 19, 1983, in which he made clear that he was not claiming entitlement to receive a promotion in the unclassified ranks, but rather that "the arbitrary and capricious manner in which this situation has been handled by the Prosecutor violates the basic tenets of Civil Service law, and therefore my rights as well." App. at 93.

Unsuccessful administratively,[2] Zamboni then

---

2. In an apparently unrelated action, in 1987 the New Jersey Department of Personnel, the executive office charged with enforcing the civil service laws under the revised civil service statute, *see* N.J. Stat. Ann. §§ 11A:2-8 to -13, after conducting a desk audit on Zamboni's position and discovering that he did not have any supervisory responsibilities, determined that the civil service rules did not permit him to be classified under the title of

turned to the New Jersey courts. His complaint asserted that the reorganization plan violated the civil service laws "in that defendants have circumvented established guidelines for the promotion of individuals in the classified service." App. at 88-89. Zamboni asked the court for an adjudication that the promotion plan was unlawful and for an order directing the defendants to, *inter alia*, cancel all promotions made under the new plan and cease requiring Zamboni to perform duties that were outside of his job title. The Law Division, affirmed by the Appellate Division of the Superior Court, sustained Stamler's authority to make the promotions at issue. *Zamboni v. Stamler*, 194 N.J. Super. 598, 477 A.2d 449 (Law Div. 1984), *aff'd*, 199 N.J. Super. 378, 489 A.2d 1169 (App. Div. 1985).[3]

Zamboni contends in the present lawsuit filed in federal court in April 1985 under 42 U.S.C. § 1983 that from the time that he began to protest Stamler's reorganization plan he was subjected to numerous disciplinary actions, including his transfer to the Trial Unit; a four-day suspension without pay for failing to keep accurate records while in the Welfare Fraud Unit; a $100 fine for insubordination for using office stationery to write his complaint to the Civil Service Commission; orders to turn in his gun and submit to a psychiatric exam due to his "attitude" problems; and numerous written reprimands for, for example, failing

---

lieutenant. The Department of Personnel therefore wrote a letter to Stamler stating that Zamboni was reclassified under the title of County Detective and that Stamler was either to institute the appropriate demotional procedures or assign Zamboni to the "performance of duties commensurate with the specification for Lieutenant of County Detectives." App. at 153. It is unclear from the record what action, if any, Stamler took in response.

3. The Superior Court consolidated Zamboni's action with that of three other detectives in the prosecutor's office, who did not apply for leaves of absence and were therefore not ever considered for promotion. The claims of those detectives are not at issue here.

to say "Good Morning" to Stamler, sending a memo directly to Stamler rather than through the chain of command, asking an assistant prosecutor about his (Zamboni's) state court case during office hours, and not being able to be located during work hours.

Zamboni names as defendants Stamler, certain other officials of Stamler's staff, the County of Union, and the Union County Prosecutor's Office (hereinafter collectively referred to as "Stamler"). Zamboni alleges that the disciplinary actions were taken in retaliation for his criticism of the reorganization plan, thereby violating his First and Fourteenth Amendment rights and giving rise also to the state law torts of wrongful retaliation and intentional infliction of emotional distress. Notwithstanding that for the purposes of their summary judgment motion defendants conceded and the district court assumed that these disciplinary measures not only occurred, but also were taken in reprisal for Zamboni's outspoken opposition to the reorganization plan, the district court granted Stamler's motion for summary judgment and dismissed the complaint with prejudice. *Zamboni v. Stamler et al.*, slip op., No. 85-1748 (D.N.J. June 10, 1987). Zamboni appeals.[4] We have jurisdiction over the order of the district court pursuant to 28 U.S.C. § 1291 and our review is plenary. *See Gans v. Mundy*, 762 F.2d 338, 340 (3d Cir.), *cert. denied*, 474 U.S. 1010 (1985).

II.

First Amendment Protected Speech

A.

Nearly a century ago, in flatly rejecting a public employee's First Amendment claim, Justice Holmes

---

4. On appeal, Zamboni has abandoned his arguments under the Fourteenth Amendment and we therefore do not review the district court's grant of summary judgment on that issue.

wrote: "[A policeman] may have a constitutional right to talk politics, but he has no constitutional right to be a policeman." *McAuliffe v. Mayor of New Bedford*, 155 Mass. 216, 220, 29 N.E. 517, 517 (1892). Twentieth century jurisprudence has accorded public employees substantially more First Amendment protection than Justice Holmes contemplated. From *Pickering v. Board of Education*, 391 U.S. 563 (1968), to *Connick v. Myers*, 461 U.S. 138 (1983), to *Rankin v. McPherson*, 107 S.Ct. 2891 (1987), the Supreme Court has sought to prevent "a State [from] condition[ing] public employment on a basis that infringes the employee's constitutionally protected interest in freedom of expression." *Connick*, 461 U.S. at 142. On the other hand, because the state may have an interest as an employer in regulating the speech of its employees, the judicial task is to strike a "balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Pickering*, 391 U.S. at 568.

Accordingly, the threshold inquiry is whether Zamboni's speech is protected, which first entails a determination of whether his expressions may be "fairly characterized as constituting speech on a matter of public concern," *Connick*, 461 U.S. at 146, because when a public employee speaks "upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum" for review. *Id.* at 147. Whether the speech is on a matter of public concern is a legal determination, to be "determined by the content, form, and context of a given statement, as revealed by the whole record." *Connick*, 461 U.S. at 147-48 & n.7 (footnote omitted). *See generally* Parker, *Free Expression and the Function of the Jury*, 65 B.U.L. Rev. 483, 510-24 (1985). Our review is therefore plenary.

The thrust of Zamboni's speech related to his opposition to Stamler's reorganization plan and, in particular, to how promotions were to be made under that plan. That opposition raised significant issues concerning, *inter alia*, whether the county prosecutor had impermissibly circumvented the civil service laws, the role of civil service employees in the county prosecutor's office, and the manner in which the county prosecutor, the county's highest law enforcement official, performed his administrative functions. The New Jersey Superior Court characterized Zamboni's state law challenge as "rais[ing] significant issues regarding the authority of county prosecutors to make appointments to positions of superior officers in the investigative staff in the unclassified service." *Zamboni v. Stamler*, 194 N.J. Super. 598, 600, 477 A.2d 449, 450 (Law Div. 1984), *aff'd*, 199 N.J. Super. 378, 383, 489 A.2d 1169, 1172 (App. Div. 1985).

This court has repeatedly found that public employees' criticism of the internal operations of their places of public employment is a matter of public concern. Most recently, in *Rode v. Dellarciprete*, No. 87-5368 (3d Cir. April 28, 1988), a case raising similar issues to those before us, we held that a civilian employee of the Pennsylvania State Police who spoke to a reporter concerning her personnel problems and allegations that she was being harassed because of racial animus "was speaking on a matter of public concern." *Id.*, slip op. at 11; *see also Czurlanis v. Albanese*, 721 F.2d 98 (3d Cir. 1983) (county auto mechanic's criticism at public county board meeting of the internal management of the Department of Motor Vehicles); *Trotman v. Board of Trustees of Lincoln University*, 635 F.2d 216 (3d Cir. 1980) (professors' criticism of university president's efforts to increase faculty/student ratio), *cert. denied*, 451 U.S. 986 (1981); *Monsanto v. Quinn*, 674 F.2d 990 (3d Cir.

1982) (tax department employee's letters to tax commissioner expressing dissatisfaction with operation and management of the Tax Division).

Stamler argues, however, that Zamboni's speech does not involve a matter of public concern because, in opposing the reorganization plan, Zamboni had a "singular purpose -- to invalidate a promotional plan which was adverse to him." Appellees' Brief at 15. The district court, relying on *Murray v. Gardner*, 741 F.2d 434 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1050 (1985),[5] likewise deemed fatal to Zamboni's First Amendment claim its finding that his "primary motivation was to contest his failure to be promoted and his transfer to the Trial Unit." *Zamboni v. Stamler, et al.*, No. 85-1748, slip op. at 13 (D.N.J. June 10, 1987).

While it is uncontested that Zamboni had a personal stake in the speech at issue, our opinion in *Rode* makes clear that Zamboni's motivation is "merely one factor to be considered, but not necessarily controlling, in assessing the character of [the employee's] speech." *Rode*, slip op. at 11. Judge Rosenn, writing for the court in *Rode*, stated that "complete reliance" on the employee's motivation in speaking is inappropriate. *Id.* In *Connick*, the Supreme Court held that one of the questions posed by the assistant district attorney's inter-office questionnaire was of public concern, even though the other questions were "mere extensions of [her] dispute over her transfer." *Connick*, 461 U.S. at 148. Were

5. In *Murray*, plaintiff's speech concerned a furlough lottery instituted to determine which employees were to be laid off. The court held this "was purely a labor relations matter, an arrangement of employees under which some would win and some would lose." 741 F.2d at 438. Because the *Murray* facts are substantially different from those before us, we have no occasion to comment on how that case would be decided under this court's precedent.

motivation rather than content dispositive, the Court would have had no reason to isolate the one question that was of public concern from all the others. Indeed, it is unlikely that any employee who lacks a personal interest in the subject that gives rise to the speech in question would file a lawsuit to vindicate his or her First Amendment rights.

It is also relevant in determining the character of Zamboni's speech that the comments he alleges precipitated the retaliatory actions were made not only in a private meeting with Stamler but also to the appropriate officials who were in a position to redress the actions of the prosecutor that Zamboni challenged. Zamboni wrote to the Civil Service Commission, appealed to the appropriate administrative body, and filed a lawsuit. In all of these expressions, Zamboni referred to the policy issue as well as to his personal complaint. We therefore hold as a matter of law that Zamboni's speech was speech that was on a matter of public concern.

B.

It then becomes necessary to ascertain whether Zamboni's speech caused such interference with "the effective functioning of the public employer's enterprise" as to justify the action taken in response. *Rankin*, 107 S. Ct. at 2898-99. This balancing, required by *Pickering*, 391 U.S. at 568, is also a legal determination. *See Pennekamp v. Florida*, 328 U.S. 331, 335 (1946)) ("we are compelled to examine for ourselves the statements in issue and the circumstances under which they were made to see whether or not they . . . are of a character which the principles of the First Amendment . . . protect"); *see also Rankin*, 107 S.Ct. at 2897.

Although the court in *Rode* was able in the first instance on appeal to determine that Rode's exercise of free speech "did not impermissibly affect the State's

interest in the efficiency and performance of the [police]." *Rode*, slip op. at 14. In this case the record is insufficiently developed on the disruption issue. We will therefore remand to the district court for it to consider whether Zamboni's speech caused any disruption in Stamler's office and, if so, whether that disruption was so severe as to override both Zamboni's and society's First Amendment interests. In the interests of judicial economy and in order to guide the district court in its determination of this matter, we discuss briefly the relevant issues to be addressed.

At the outset, we reject Stamler's suggestion at oral argument that a finding of *potential* disruption could be sufficient to outweigh Zamboni's interests. To the contrary, in cases such as this involving speech on matters of significant public concern, a showing of *actual* disruption is required. *See American Postal Workers Union v. United States Postal Service*, 830 F.2d 294, 303 & n.12 (D.C. Cir. 1987). In *Pickering*, for example, where the Supreme Court held that a teacher's interest in expressing his criticism of the fiscal policies of the Board of Education was stronger than the Board of Education's in not having him speak, the Court noted that the teacher's speech was "neither shown nor can be presumed to have in any way either impeded the teacher's proper performance of his daily activities in the classroom or to have interfered with the regular operation of the schools generally." 391 U.S. at 572-73 (footnote omitted); *see also Rankin*, 107 S.Ct. at 2899; *Trotman*, 635 F.2d at 230.

Defendants ask us to decide as a matter of law from this record that Zamboni's admitted actions in failing to say "Good Morning" to Stamler and referring to him as "your boss" rather than "my boss" present sufficient potential for disruption to override Zamboni's First Amendment right to speak on a matter of public concern. We reject Stamler's argument. The free speech

right protected by our Constitution is not so ephemeral.

Moreover, a finding of actual disruption, while necessary, is not sufficient to a determination that the employee's speech is not protected. As we stated in *Czurlanis*, "'[t]he First Amendment balancing test [of *Pickering*] can hardly be *controlled* by a finding that disruption did occur. . . . The point is simply that the balancing test articulated in *Pickering* is truly a balancing test, with office disruption or breached confidences being only weights on the scales.'" 721 F.2d at 107 (quoting *Porter v. Califano*, 592 F.2d 770, 773-74 (5th Cir. 1979)). In considering whether any disruption was, in fact, material and substantial, consideration of Zamboni's role in the office will be important. *See Rankin*, 107 S.Ct. at 2900. In particular, the district court will have to determine whether Zamboni's functional role in the prosecutor's office was of such proximity to Stamler that his speech destroyed "a needed close working relationship." *Czurlanis*, 721 F.2d at 106; *see also Sprague v. Fitzpatrick*, 546 F.2d 560, 565 (3d Cir. 1976), *cert. denied*, 431 U.S. 937 (1977).[6]

Furthermore, in evaluating the disruption, if any, that resulted from Zamboni's criticisms of Stamler's reorganization plan, the district court must consider

---

6. Because Stamler conceded for the purposes of the summary judgment motion that "all of these disciplinary actions about which Zamboni complains were in reprisal for his opposition to the reorganization plan and its ramifications upon him," Appellees' Brief at 7, we do not reach the issue of whether the protected activity was a substantial or motivating factor in the actions taken against Zamboni, or whether the same actions would have been taken even had Zamboni not engaged in protected conduct. *See* Trotman v. Board of Trustees of Lincoln University, 635 F.2d 216, 224 (3d Cir. 1980), *cert. denied*, 451 U.S. 986 (1981). We note that these inquiries, which follow a determination that speech is protected, are for the jury. *See* Johnson v. Lincoln University, 776 F.2d 443, 454 (3d Cir. 1985).

whether any unrest was caused directly by Zamboni's speech or whether it was exacerbated by defendants' actions. Here, Zamboni contends that it was defendants themselves who created disruption, if any, by spreading Zamboni's chalienge among the members of the office, ordering other employees not to associate with Zamboni, and engaging in petty recriminations which were made the subject of general knowledge within the office. *See Rode*, slip op. at 14; *Czurlanis*, 721 F.2d at 107.

Accordingly, we will remand this matter to the district court to determine whether Zamboni's speech caused such actual and substantial disruption of the prosecutor's office as to justify the retaliatory measures taken against him.[7] If the court finds that the speech was protected after engaging in the *Pickering* balance, there would remain for disposition defendants' claim that they would have taken the same actions against Zamboni in any event. This is an issue for the jury. *See supra*, note 6.

---

7. In addition to their other arguments, the individual defendants assert that they are immune from suit in their individual capacities under the qualified immunity doctrine of Harlow v. Fitzgerald, 457 U.S. 800 (1982). Although the district court did not reach this issue, the defendants argue that "[t]he question of a public official's qualified immunity is . . . purely a question of law" which this court should determine. Appellee's Brief at 45-46. Defendants' argument that Zamboni's First Amendment rights were not clearly established at the time the action occurred cannot be sustained in light of this court's line of precedent on public employees' protected speech. *See, e.g.*, Czurlanis v. Albanese, 721 F.2d at 107; Trotman v. Board of Trustees of Lincoln University, 635 F.2d at 224-25. In Bennis v. Gable, 823 F.2d 723, 733 (3d Cir. 1987), we stated that "as of 1982 the law was 'clearly established' that a public employee could not be demoted in retaliation for exercising his rights under the first amendment," and rejected defendants' qualified immunity claim in the political patronage context.

III.

Tort Liability

A.

Intentional Infliction of Emotional Distress

Turning to the pendent claims, Zamboni challenges the district court's holding that the allegations which formed the basis of his claim for intentional infliction of emotional distress were insufficient as a matter of law. The relevant provision of the Restatement (Second) of Torts § 46, which the New Jersey courts have adopted, provides:

> § 46. Outrageous Conduct Causing Severe Emotional Distress.
>
> (1) One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm results from it for such bodily harm.

New Jersey courts have recognized a claim for intentional infliction of emotional distress where a physician knowingly and untruthfully told parents that their son was suffering from cancer, *Hume v. Bayer*, 178 N.J. Super. 103, 428 A.2d 966 (Law Div. 1981), and a possible claim where a hospital was unable to locate the body of dead baby for three weeks, *Muniz v. United Hospitals Medical Center*, 153 N.J. Super. 79, 379 A.2d 57 (App. Div. 1977). *See generally Polito v. Continental Casualty Co.*, 689 F.2d 457, 464 (3d Cir. 1982) (tracing New Jersey law).

Zamboni alleges that Stamler engaged in such constant harassment of him that the workplace became oppressive, resulting in Zamboni's development of a painful and chronic spastic colon and psychological and emotional problems. We do not

deprecate the toll that petty vindictive behavior by an employer can wreak on vulnerable employees. However, even if Zamboni's allegations are true, which the district court assumed *arguendo*, we believe that the New Jersey courts would hold that the conduct alleged does not rise to the level required for the tort of intentional infliction of emotional distress. We make such a prediction based on the New Jersey court's definition of such a tort as contemplating conduct so extreme and outrageous "as to go beyond all possible bounds of decency, and be regarded as atrocious and utterly intolerable in a civilized community." *Hume v. Bayer*, 178 N.J. Super. at 314-15, 428 A.2d at 968 (quoting Restatement (Second) of Torts § 46 comment d (1965)). *Accord Polito*, 689 F.2d at 464. It follows that the district court did not err in dismissing this claim.

B.

Wrongful Retaliation

We find it more difficult to predict how the New Jersey courts would treat Zamboni's contention that because Stamler's retaliatory conduct violated the public policy of New Jersey, he may maintain a tort claim under the New Jersey line of cases upholding a cause of action for wrongful discharge. *See, e.g., Lally v. Copygraphics*, 85 N.J. 668, 428 A.2d 1317 (1981) (employee dismissed for filing workers' compensation claim); *Pierce v. Ortho Pharmaceutical Corp.*, 84 N.J. 58, 417 A.2d 505 (1980) (recognizing tort but holding it inapplicable to physician discharged for refusing to work on certain drug research). The district court rejected this claim on the ground that it would be inappropriate to expand the scope of the tort recognized in these cases to encompass a situation other than that involving discharge or disciplinary action that was virtually equivalent to discharge.

As a federal court exercising jurisdiction over this pendent state claim, we are obliged to predict how the New Jersey Supreme Court would decide were it presented with the issue. *See West v. American Tel. & Tel. Co.*, 311 U.S. 223, 236-37 (1940). In the absence of explicit guidance from the New Jersey Supreme Court, we "must consider relevant state precedents, analogous decisions, considered dicta, scholarly works, and any other reliable data tending convincingly to show how the highest court in the state would decide the issue." *McKenna v. Ortho Pharmaceutical Corp.*, 622 F.2d 657, 663 (3d Cir.), *cert. denied*, 449 U.S. 976 (1980). Moreover, we must "be sensitive to the doctrinal trends of the state . . . and the policies which inform the prior adjudication by the state courts." *Becker v. Interstate Properties*, 569 F.2d 1203, 1206 (3d Cir. 1977) (footnote omitted), *cert. denied*, 436 U.S. 906 (1978).

Although the wrongful discharge tort is indubitably a relatively new cause of action in New Jersey, it has been ungrudgingly accepted. In *Pierce*, where the wrongful discharge cause of action was first recognized, the New Jersey Supreme Court emphasized that "[t]his Court has long recognized the capacity of the common law to develop and adapt to current needs." 84 N.J. at 71, 417 A.2d at 511. The Court explained that it was necessary to balance the interests of the employees in knowing they will not be discharged for exercising their legal rights, the interests of employers in knowing they can run their businesses as they see fit as long as their conduct is consistent with public policy, and the public interest in employment stability and in discouraging frivolous lawsuits by dissatisfied employees. *Id.* at 71, 417 A.2d at 511.

More recently, in *Woolley v. Hoffmann-LaRoche, Inc.*, 99 N.J. 284, 491 A.2d 1257, *modified*, 101 N.J. 10, 499 A.2d 515 (1985), the New Jersey Supreme

Court extended judicial protection to at-will employees from dismissal without cause when the company's employment manual contained a promise that the employees would only be dismissed for cause. In so doing, the Court described the trend in New Jersey from *Pierce* forward that supported its holding:

> No longer is there the unquestioned deference to the interests of the employer and the almost invariable dismissal of the contentions of the employee. Instead . . . this Court [is] no longer willing to decide these questions without examining the underlying interests involved, both the employer's and the employees', as well as the public interest, and the extent to which our deference to one or the other serve[s] or disserve[s] the needs of society as presently understood.

Woolley, 99 N.J. at 291, 491 A.2d at 1261; *see also Herring v. Prince Macaroni of New Jersey, Inc.*, 799 F.2d 120, 123-24 (3d Cir. 1986) (predicting that New Jersey would extend *Lally* right of action for discharge in retaliation for filing workers' compensation claims to contractual employees covered by collectively bargained "just cause" clauses). In *Kass v. Brown Boveri Corp.*, 199 N.J. Super. 42, 55, 488 A.2d 242, 249 (App. Div. 1985), the court, relying on *Pierce*, held that an employee who resigned could nonetheless maintain a breach of contract action and stated that "to permit plaintiff's employer to use the resignation to bar liability for its breach of contract would offend the interests of justice."

Moreover, because the New Jersey Supreme Court in *Pierce* followed a California decision, *see Pierce*, 84 N.J. at 68-69, 417 A.2d at 510 (citing *Tameny v. Atlantic Richfield Co.*, 27 Cal. 3d 167, 610 P.2d 1330, 164 Cal. Rptr. 839 (1980)), it is of some significance that a California case recently extended the scope of the

wrongful discharge cause of action to retaliatory disciplinary conduct that fell short of discharge. *See Garcia v. Rockwell International Corporation*, 187 Cal. App. 3d 1556, 1562, 232 Cal. Rptr. 490, 493 (1987) ("The same wrongful conduct is involved whether the retaliation inflicted is a six-month suspension without pay or a discharge.").

Zamboni alleges that Stamler imposed on him a *de facto* demotion when he was transferred to the Trial Unit, a four-day suspension without pay, a $100 fine, and a series of minor disciplinary actions. Stamler contends that if we accept Zamboni's proposition that such actions are cognizable as a tort, "each and every minor disciplinary action by an employer . . . would be subject to employee claims of retaliatory action." Appellees' Brief at 36. There is some force to Stamler's argument. We predict, based on the balance of interests referred to in *Pierce*, 84 N.J. at 71, 417 A.2d at 511, that the New Jersey Supreme Court would confine the tort of unlawful retaliation to formal personnel actions that have an effect on either compensation or job rank, and would exclude therefrom the majority of disciplinary actions and harassment alleged by Zamboni.

If only termination were cognizable an employer could retaliate against an employee for his or her protected speech with an almost equally harsh sanction of a demotion or suspension. The district court stated that the tort claim was limited to "discharge or disciplinary action taken that was virtually equivalent to discharge." App. at 43. It is unclear whether the district court would have considered any demotion or suspension as cognizable. Accordingly, although we are skeptical that the *de facto* demotion and four-day suspension alleged by Zamboni meet the standard set forth above for the tort of unlawful retaliation, we are unwilling at this stage of the proceeding to cut off at the pass Zamboni's attempt

to so prove. The district court may consider this issue on remand. Moreover, as a practical matter, the damages flowing from this tort, if proven, appear to be indistinguishable from those that would flow from the First Amendment claim, which is not limited to termination. *See Bennis v. Gable*, 823 F.2d 723, 731-32 (3d Cir. 1987).

Stamler argues that even if New Jersey recognizes a tort of wrongful retaliation short of discharge, we should affirm the dismissal of Zamboni's claim because the retaliatory action did not violate a clearly expressed public policy of the state.

In *Pierce*, the New Jersey Supreme Court described the relevant sources of public policy to support a wrongful discharge claim as including "legislation; administrative rules, regulations or decisions; and judicial decisions." 84 N.J. at 72, 417 A.2d at 512. Significantly, after Zamboni filed this suit, New Jersey enacted a specific provision protecting civil service employees from "*any action* . . . [taken] in retaliation for an employee's lawful disclosure of information on the violation of any law or rule, governmental mismanagement or abuse of authority." N.J. Stat. Ann. § 11A:2-24 (West Supp. 1987) (emphasis added). We view the legislature's action, which is consistent with other statutory provisions barring retaliation against workers in a variety of contexts,[8] as reflective of existing public policy disapproving retaliation in whatever form against a civil servant who exposes a

---

8. *See, e.g.*, N.J. Stat. Ann. 2A:65A-3 (West 1987) (refusing to perform abortions); N.J. Stat. Ann. § 10:5-12(d) (West Supp. 1987) (prohibiting employers from taking any reprisals against employees for, *inter alia*, opposing unlawful discriminatory acts or filing complaints under the New Jersey Law Against Discrimination); N.J. Stat. Ann. § 34:5A-17 (West Supp. 1987) (exercising rights under the laws governing hazardous substances in the work place); N.J. Stat. Ann. § 34:6A-45 (West Supp. 1987) (exercising rights under the laws governing occupational safety and health); N.J. Stat. Ann. § 34:15-39.1 (West Supp. 1987) (claiming worker's compensation benefits).

possible abuse of authority by a governmental official. Although section 11A:2-24 does not explicitly provide a private right of action, the absence of such a provision in the workers' compensation statute did not prevent the New Jersey Supreme Court in *Lally* from sustaining an action based on retaliation. In fact, the Court stated that "[t]he statutory declaration of the illegality of such a discharge underscores its wrongful and tortious character for which redress should be available." 85 N.J. at 670, 428 A.2d at 1318.

Stamler's retaliatory actions, if proven, contravened not only the public policy prohibiting reprisals against civil service employees for disclosing improprieties, but also the First Amendment of the United States Constitution; the liberty of speech and freedom of assembly clauses of the New Jersey Constitution, N.J. Const. art. 1, paras. 6, 18; and the decisions of the New Jersey courts that demonstrate New Jersey's commitment to the freedom of expression rights of its public employees. *See, e.g., Hall v. Mayor of Pennsauken*, 176 N.J. Super. 229, 422 A.2d 797 (App. Div. 1980); *Ramirez v. County of Hudson*, 167 N.J. Super. 435, 400 A.2d 1230 (Ch. Div. 1979). We therefore reject Stamler's claim that Zamboni failed to allege a violation of a "clear mandate of public policy" to support a tort action for wrongful retaliation.

IV.

Conclusion

For the reasons set forth above, we will reverse the order of the district court granting summary judgment to the defendants and remand for further proceedings consistent with this opinion.

1m240.

Appendix A

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX B — JUDGMENT AND ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

87-5397

JOHN N. ZAMBONI,

Appellant

v.

JOHN H. STAMLER, PROSECUTORY OF UNION COUNTY, and individually; PATRICK J. MALONEY, CHIEF OF INVESTIGATIONS FOR THE UNION COUNTY PROSECUTOR'S OFFICE and individually; RICHARD P. RODBART, TRIAL SUPERVISOR FOR THE UNION COUNTY PROSECUTOR'S OFFICE and individually; EDMUND J. TUCKER, FIRST ASSISTANT PROSECUTOR OF UNION COUNTY and individually; COUNTY OF UNION; UNION COUNTY PROSECUTOR'S OFFICE

(D.C. Civil No. 1748)
ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSERY

Present: GIBBONS, *Chief Judge,* SLOVITER and COWEN, *Circuit Judges*

JUDGMENT

This cause came on to be heard on the record from the United

Appendix B

States District Court for the District of New Jersey and was argued by counsel December 17, 1987.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court entered May 29, 1987, be, and the same is hereby reversed and the cause remanded to the said District Court for further proceedings consistent with the opinion of this Court. Costs taxed against the appellees.

ATTEST:

s/ Sally Mrvos
Clerk

May 17, 1988

Certified as a true copy and issued in lieu
of a formal mandate on June 8, 1988.

Test: s/ Elizabeth Ferguson
Chief Deputy Clerk
United States Court of Appeals,
for the Third Circuit

APPENDIX C — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY DATED JUNE 10, 1987

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Civil Action No. 85-1748

JOHN N. ZAMBONI,

Plaintiff,

v.

JOHN H. STAMLER, Union County Prosecutor, Individually, *et al.*,

Defendants.

BISSELL, District Judge.

The instant civil rights action arises out of an Amended Verified Complaint filed on February 24, 1986 by John N. Zamboni, a Lieutenant of Detectives in the Detective Bureau of the Union County Prosecutor's Office. Named as defendants are Union County, the Union County Prosecutor's Office and several employees of that office, John H. Stamler, Prosecutor; Patrick J. Maloney, Chief of Investigations; Richard P. Rodbart, Assistant Prosecutor and Trial Supervisor; and Edmund J. Tucker, First Assistant Prosecutor. Federal jurisdiction is predicated on 28 U.S.C. §§1331 and 1343 as plaintiff asserts violations of 42 U.S.C. §§1983, 1985 and 1988.

The Amended Verified Complaint alleges that Mr. Zamboni

was subjected to a pattern of harassment by defendants in retaliation for having exercised First Amendment rights or, more specifically, for having voiced his opposition to a reorganization plan implemented by the Union County Prosecutor's Office. Plaintiff asserts causes of action for violations of his rights of expression and association under the First and Fourteenth Amendment of the U.S. Constitution and Article I, §G of the N.J. Constitution (First Claim of Relief); his Fourteenth Amendment due process rights (Second Claim For Relief); pendant state law claims for retaliation contrary to the New Jersey Civil Service Law and public policy of New Jersey (Third Claim For Relief), and intentional infliction of emotional distress (Fourth Claim For Relief). Mr. Zamboni seeks a declaratory judgment, a preliminary and permanent injunction, compensatory and punitive damages, costs and attorneys' fees.

The present motion entitled a "motion to dismiss the complaint or, in the alternative, for summary judgment" will be accorded summary judgment treatment due to the various matters outside the pleadings submitted by the parties. Defendants Maloney, Tucker and Union County have joined in this motion filed by defendants Stamler and Rodbart.

A global description of plaintiff's complaints is as follows:

> Specifically, Plaintiff complains that the Defendants, acting in concert and individually and under color of state law, custom, or usage, have intentionally, willfully, wantonly and maliciously engaged and continue to engage in the patterns and practices which have deprived the Plaintiff of his rights to the free exercise of speech, association and due process by, among other things, harassing

> him in his employment, wrongfully suspending him without pay and an opportunity to be heard, depriving him promotional opportunities, threatening the loss of his reputation and status as a law enforcement officer, and threatening the loss of his job.

(Amended Verified Complaint at ¶12).

Plaintiff, employed by Union County since 1967, became a detective with Civil Service classification in 1973 and currently is Lieutenant Detective in the Detective Bureau. *Id.* at ¶11. In or about November 1982, the Prosecutor instituted a reorganization plan which plaintiff opposed in part by filing a lawsuit in state court in 1983. Plaintiff alleges that said opposition made him a target of harassment by defendants which threatened both his employment and health. *Id.* at ¶¶13, 14.

The retaliatory disciplinary actions of defendants did not take the form of a termination or demotion. Rather, they consist of a four-day suspension without pay and without a pre-suspension hearing, (*id.* at ¶18; Defendants' Brief, Exhibit G); a $100 fine assessed for insubordination and breach of discipline (Defendants' Brief, Exhibit F); the transfer of plaintiff from a supervisory position as Commander of the Welfare Fraud Unit to a position in the Trial Unit not entailing supervisory duties as required under plaintiff's job title (Amended Verified Complaint at ¶21; Plaintiff's Brief at 1); the leveling of formal charges against plaintiff for which he received departmental hearings (Amended Verified Complaint at ¶17; Plaintiff's Brief, Exhibit U); several written reprimands for petty instances of misconduct (Amended Verified Complaint at ¶15; Defendants' Brief, Exhibits B, C, D, E; Plaintiff's Brief, Exhibit H); and minor personnel actions such

as requiring plaintiff to turn in his revolver and to submit to a psychiatric evaluation because of his attitude (Amended Verified Complaint at ¶22; Plaintiff's Brief at 4); checking up on plaintiff during a 17-day period of sick leave (Amended Verified Complaint at ¶16; Plaintiff's Brief at 5-6); not permitting plaintiff to use a county car (Plaintiff's Brief at 3), and attempting to isolate plaintiff from his co-workers (Amended Verified Complaint at ¶19; Plaintiff's Brief at 3).

For purposes of this motion for summary judgment, defendants concede that all of the aforementioned disciplinary actions occurred and that they were taken with a retaliatory purpose. (Defendants' Brief at 6, 12). Accordingly, no genuine issues of material fact exist and thus, this motion is ripe for adjudication. The Court need only determine whether the moving parties are entitled to a judgment as a matter of law. *Fed.R.Civ.P.* 58(c).

I. First Claim For Relief, Violation of Plaintiff's Rights To Freedom of Expression and Association

Defendants seek summary judgment on the First Claim For Relief alleging violations of plaintiff's right to freedom of expression and association under the U.S. and N.J. Constitutions on the ground that plaintiff's rights are not of constitutional dimension in this case, and therefore, not protectible. Defendants' argument is predicated on the well-established rule of law that a public employee enjoys First Amendment protection only in connection with matters of public concern.

This issue is governed by the Supreme Court's decision in *Connick v. Myers*, 461 U.S. 138 (1983). Myers, a former Assistant District Attorney, filed a §1983 action, alleging that she had been

wrongfully terminated for having exercised her . . . . Amendment right to free speech. After receiving notification that she was to be transferred to a different section of the criminal court, Myers distributed to 15 Assistant District Attorneys a questionnaire addressing office transfer, office morale, the need for a grievance committee, the level of confidence in supervisors and whether the employees felt compelled to work in political campaigns. Thereafter, Myers was terminated allegedly for refusing to accept the transfer and because her distribution of the questionnaire was deemed an act of insubordination.

In deciding whether Myers' First Amendment rights were violated, the Court enunciated a two-part test: first, the speech at issue must be examined to determine if it deals with a matter of public concern. If it does not, the Court's inquiry is ended. If it does, the Court must balance the interests of the public employer in promoting the efficiency of the public service it performs and that of the public employee in speaking as a citizen on a matter of public concern. *Id.* at 146, 149-150.

In connection with the first step, the Court held:

> . . . when a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior. *Cf. Bishop v Wood, supra,* at 349-350, 48 L Ed 2d 684, 98 S Ct 2074.

Id. at 147. The Court explained, "[w]hether an employee's speech

addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record." *Id.* at 147-8. (footnote omitted).

All questions of the questionnaire, except that regarding political campaigning, were deemed not of public concern and therefore not protectible by the First Amendment. The Court explained:

> Myers did not seek to inform the public that the District Attorney's Office was not discharging its governmental responsibilities in the investigation and prosecution of criminal cases. Nor did Myers seek to bring to light actual or potential wrongdoing or breach of public trust on the part of Connick and others. Indeed, the questionnaire, if released to the public, would convey no information at all other than the fact that a single employee is upset with the status quo. While discipline and morale in the workplace are related to an agency's efficient performance of its duties, the focus of Myers' questions is not to evaluate the performance of the office but rather to gather ammunition for another round of controversy with her superiors. These questions reflect one employee's dissatisfaction with a transfer and an attempt to turn that displeasure into a cause celebre.

Id. at 148 (footnote omitted). With regard to the limited First Amendment right involved, based on the question concerning political campaigning, the Court found that the balancing of interests weighed in favor of the employer.

Appendix C

Not every word of plaintiff's communications need be of interest to the public in order for Mr. Zamboni's speech regarding the reorganization plan to be protectible under the First Amendment, *Anderson v. Central Point School Dist. No. 6,* 746 F. 2d 505, 507 (9th Cir. 1984). However, "the primary motivation of the employee must be the desire to inform the public on matters of public concern, and not personal vindictiveness." *Fiorillo v. U.S. Dep't of Justice,* 795 F. 2d 1544, 1550 (Fed. Cir. 1986), *citing, Connick,* 461 U.S. at 148 (emphasis in original). *See also, Altman v. Hurst,* 734 F. 2d 1240, 1244 (7th Cir. 1984), *cert. denied,* 469 U.S. 982 (1984) (plaintiff's speech was not protected by the First Amendment "[g]iven the essentially 'private motive' for the speech.")

Mr. Zamboni maintains that taking the record as a whole, his challenging of the Prosecutor's reorganization plan as violative of Civil Service laws is a matter of public concern and that his interest in speaking out on that issue outweighs the Prosecutor's Office's interest in managing the workforce. An examination of the reorganization plan as well as the content, form and context of plaintiff's speech is essential to determine if plaintiff's speech is a matter of public concern.

The County Prosecutor has the authority by statute to appoint county detectives and county investigators. The function of those two positions are identical except that the detectives are in the classified service of the civil service whereas investigators are not and therefore serve at the pleasure of the Prosecutor. *Zamboni v. Stamler,* 194 N.J. Super. 598, 600-1 (Law Div. 1984), *aff'd,* 199 N.J. Super. 378 (App. Div. 1985). The reorganization plan was described by the Appellate Division:

Under the reorganization plan, the prosecutor

> established superior officer positions within the unclassified service of the county investigators. The chain of command generally paralleled the hierarchial structure of the county detectives. Selected members of the detective staff were offered superior officer positions as investigators. Those detectives who accepted such offers executed temporary leaves of absence from their classified positions. They retained the right to be reinstated to their former classified status at the expiration of their leaves of absence. The prosecutor also advised the detectives that he would not consider promotions within the classified ranks. Hence, the sole means of advancement under the prosecutor's reorganization was by way of accepting a supervisory or supervisor officer position in the unclassified service of investigators. The articulated objective of the plan was to provide greater flexibility within the county prosecutor's office. An auxiliary purpose was to insure greater stability and expertise in the traditional trial preparatory positions.

Zamboni, 199 N.J. Super. at 380.

Several transactions initiated by Mr. Zamboni indicate the form, content and context of plaintiff's speech. Plaintiff mentions, without supporting evidence, that he had a lengthy discussion with Prosecutor Stamler prior to the implementation of the reorganization plan to air his concern that promotions would not be made according to merit and fitness as required under the Civil Service laws. (Plaintiff's Brief at 9-10).

Appendix C

Thereafter, in accordance with the reorganization plan, Mr. Zamboni requested a leave of absence from his classified position as a detective to become an investigator in the unclassified service. He then applied for a promotion but was not among those selected for promotion by defendant Stamler in or about January 1983. Those promotions were effective March 1, 1983.

On March 8, 1983, plaintiff wrote a letter of complaint to the Civil Service Commission stating that the Prosecutor was attempting to carry out his own appointment and promotional plans in contravention of the civil service rules and the New Jersey Constitution. (Defendants' Brief, Exh. A). Mr. Zamboni also explained at length the fact that he had pursued a promotion in accordance with the procedures of the reorganization plan and the circumstances surrounding his transfer to the Trial Unit. Plaintiff complained that because his duties in the Trial Unit entailed no supervisory role, he viewed the transfer as a demotion, and further asserted that the reasons given by Prosecutor Stamler for the transfer were both misleading and untrue. Mr. Zamboni summed up his sentiments therein as follows:

> I realize that my complaints may be taken as "sour grapes", as I was not one of the superior officers selected for promotion. I can assure you that this is not the case. I cannot of course, speak for the superior officers left in the same position as I am nor can I speak for the four detectives in the Classified service who were never even afforded the opportunity to take a leave of absence and thus become eligible for promotion along with the investigators in the Unclassified service, who have been given this opportunity according to the Prosecutor's Organizational Plan. This hippocracy

> on the part of the Prosecutor, I am sure they will deal with in their own good time. I can only say, in all honesty, that what has transpired does not come as a surprise. Prosecutor Stamler's egotistical mentality and vindictive personality has, at one time or another, touched almost every member of the Prosecutor's staff. The abnormal number of resignations from the professional staff during his tenure in office is but one indication of this aspect, and there are many others that I can point out, and back up, should this be necessary. No, it is not "sour grapes", but a sense of deep frustration and chagrin at being lied to and deceived that I write this letter.

Id. at 5.

On March 21, 1983, Mr. Zamboni wrote to Prosecutor Stamler to complain about his transfer to the Trial Unit, and the fact that defendant dissimulated the reasons for the transfer. (Plaintiff's Brief, Exh. A). Plaintiff asserted that defendant's action violated the New Jersey Constitution, the Civil Service Rules and classification specifications and requested an assignment to a position commensurate with his duties as Lieutenant of County Detectives.

Plaintiff filed a complaint in lieu of prerogative writ in June 3, 1983, against Stamler and the Union County Prosecutor's Office. (Plaintiff's Brief, Exh. B). Mr. Zamboni complained both that defendants were circumventing the established guidelines for promotion of individuals in the civil service by implementing the reorganization plan and that by his transfer to the Trial Unit, he was forced to work out-of-title. Plaintiff mentioned in the

Complaint that he underwent testing and interviewing for a promotion and was constantly reassured by Prosecutor Stamler that he was one of defendant's superior officers yet nevertheless was not promoted.[1]

Plaintiff wrote to the Division of Appellate Practices and Labor Relations of the Department of Civil service on August 19, 1983 to appeal the initial conclusions reached by the Civil Service Commission. (Plaintiff's Brief, Exhibit C). He stated that he did not claim entitlement to receive an unclassified appointment but complained that the "arbitrary and capricious manner in which this situation has been handled by the Prosecutor violates the basic tenets of Civil service law, and therefore [his] rights as well." *Id.* at 4.

After reviewing the cases cited by both sides which apply the *Connick* principles, the Court concludes that the case at bar bears greatest similarity to the case of *Murray v. Gardner,* 741 F.2d 434 (D.C. Cir. 1984), *cert. denied,* 470 U.S. 1050 (1985). Paul Murray, a special agent in the FBI, sued six supervisors for violations of his First Amendment rights. Mr. Murray alleged that he had been subjected to a series of disciplinary actions, including notification that he was accused of insubordination, being compelled to perform work outside his normal duties, being referred for discipline to the Office of Professional Responsibility, suspension without pay for 14 days, and placement on six months' probation, in retaliation for having opposed the FBI Field Office's furlough plan. Under the plan, the FBI proposed to lay off one-

---

1. The reorganization plan was upheld by the Law Division, and upon appeal, by the Appellate Division as being in compliance with civil service rules and regulations. *Zamboni v. Stamler,* 194 N.J. Super. 598 (Law Div. 1984), *aff'd,* 199 N.J. Super. 378 (App. Div. 1985) (granting defendants' motion for summary judgment).

third of the agents in the Field Office by drawing names out of a hat. "No considerations of seniority, veteran status, or performance appraisals were used in determining who would be a part of the pool." *Id.* at 435. Plaintiff was placed on furlough by the use of that procedure.

At an employees conference, Mr. Murray objected that the plan was arbitrary and capricious and that considerations of veteran status, and length of time on the job would have provided a more reasonable standard. Plaintiff objected to being coerced into silence regarding his views. *Id.* at 435-6. Plaintiff followed up with a detailed letter to the assistant to the Special Agent in Charge setting forth his allegations of coercion and that the furlough plan was arbitrary and capricious.

Mr. Murray argued that his speech at the employees conference was protected by the First Amendment. He asserted that "since his comments were directed to the furlough plan, they were 'clearly a matter of public concern' because the furlough plan involved the disposition of public funds and the quality of the federal work force." *Id.* at 437-8.

The Court granted defendants' motion for summary judgment on plaintiff's First Amendment claim, reasoning,

> . . . In other words, the role of the whistle-blower merits protection; the expressions of personal dissatisfaction by a discontented employee do not.
>
> We imagine that at times this line would be difficult to draw, as the part of a "good government" partisan is no doubt very attractive as the last refuge of the incompetent or

> discontented. But no such difficulty is present here. We discern nothing in Murray's remarks that would enrich the public's store of appropriate knowledge on the operation of the FBI or which would in any way relate to matters of general public concern. *Rather, his remarks appear to be an example of the quintessential employee beef:* management has acted incompetently. Perhaps it did—the furlough plan seems less than Solomonic. But the furlough plan was purely a labor relations matter, an arrangement of employees under which some would win and some would lose. Its connection to the matters of public concern *Connick* envisioned does not even qualify as remote. If *Connick's rule could be bypassed by the arguments that Murray raises—that public monies and government efficiency are involved—Connick would stand for nothing.* We refuse to eviscerte so recent a holding.

Id. at 438 (emphasis added).

In the instant case, the form, content and context of Mr. Zamboni's speech indicate that it too involves a "quintessential employee beef." Like Mr. Murray, Mr. Zamboni argues that the plan he challenged affected government efficiency because Prosecutor Stamler gave himself free reign to promote individuals on considerations other than merit and fitness. However, that alone is insufficient for this Court to find that plaintiff's speech was a matter of public concern. The record as a whole, explored above, reveals that plaintiff's primary motivation was to contest his failure to be promoted and his transfer to the Trial Unit. Mr. Zamboni's comments were not geared towards informing the

public that the Union County Prosecutor's Office was not properly discharging its functions or was violating Civil Service law. That is, like Ms. Myers in the *Connick* case, plaintiff Zamboni was not speaking as a citizen upon matters of public concern. The fact that plaintiff filed a lawsuit in furtherance of his objectives does not convert his speech into one involving a matter of public concern. *Altman*, 734 F. 2d at 1244 n. 10. Because of the foregoing determination, the Court need not proceed to determine whether the retaliation of the defendants against Mr. Zamboni was justified, and it declines to do so.

For the foregoing reasons, defendants' motion for summary judgment upon the First Claim for Relief is granted.

II. Second Claim for Relief, Violation of Plaintiff's Fourteenth Amendment Rights to Procedural and Substantive Due Process

In plaintiff's Second Claim for Relief, Mr. Zamboni alleges that his Fourteenth Amendment right not to be deprived of life, liberty or property without due process of law was violated by "[t]he actions of the Defendants, acting individually and/or in concert under the color of law in harassing, intimidating, coercing and otherwise, punishing and threatening the Plaintiff without good cause and based on false, scandalous and fraudulent allegations." (Amended Verified Complaint at ¶29).

A. Procedural Due Process

In support of their motion for summary judgment, defendants look at the various categories of plaintiff's alleged deprivations, *i.e.*, transfer of position, failure to be promoted, several written reprimands, $100 fine, a four-day suspension, and miscellaneous

allegedly adverse personnel actions. They argue first that plaintiff has no life, liberty or property interests of which he was deprived and, secondly, even if plaintiff was deprived of such rights, he received the process which was due. Defendants emphasize the fact that plaintiff had hearing mechanisms available to him through contract, regulation, statute and common law which plaintiff simply chose not to pursue.

No argument of a deprivation of an interest in life has been made. As for plaintiff's alleged deprivation of a liberty interest, defendants point out that the Third Circuit has held:

> An employment action implicates a fourteenth amendment liberty interest only if it (1) is based on a "charge against [the individual] that might seriously damage his standing and associations in the community . . ., for example, that he had been guilty of dishonesty, or immorality" or (2) "impose[s] on him a stigma of other disability that forecloses his freedom to take advantage of other employment opportunities." *Roth,* 408 U.S. at 573, 92 S.Ct. at 2707. Stigma to reputation alone, absent some accompanying deprivation of present or future employment, is not a liberty interest protected by the fourteenth amendment. *Id.* at 574, 92 S.Ct. at 2702; *Paul v. Davis,* 424 U.S. 693, 701-06, 96 S.Ct. 1155, 1160-63, 47 L.Ed.2d 405 (1976).

Robb v. City of Philadelphia, 733 F.2d 286, 294 (3d Cir. 1984). Defendants observe that the employment actions taken against plaintiff will not seriously damage plaintiff's reputation nor foreclose other future employment opportunities.

Appendix C

Plaintiff does not address the factually apposite case of *Robb* or the Supreme Court's decision in *Board of Regents v. Roth*, 408 U.S. 564 (1972) upon which *Robb* is based. Instead, plaintiff appears to argue predominantly that he was deprived of property rights. On this issue, the movants maintain that Mr. Zamboni has no property right or "legitimate claim of entitlement," *Roth*, 408 U.S. at 577, to a promotion under the New Jersey Civil Service laws, to a particular assignment within the Prosecutor's Office, or to being free from oral or written reprimands which do not result in a demotion or monetary loss.

Property interests "are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law . . ." *Id.* Mr. Zamboni traces his property rights to N.J.S.A. 11:22-38 and relies entirely on the case of *Salerno v. O'Rourke*, 555 F. Supp. 750 (D.N.J. 1983). N.J.S.A. 11:22-38 provides.

> 11:22-38. Removal, reductions, etc.;, reasons furnished; statement filed; approval by commission; application by employee for investigation
>
> *No* officer, clerk or *employee holding a position in the competitive class shall be removed, discharged, fined or reduced,* except as provided in section 11:22-8 of this Title as to probationers, until he has been furnished with a written statement of the reasons for such action by the appointing authority and been allowed a reasonable time to make answer thereto. A copy of the statement or reasons therefor and the answer thereto, with the

> action of the appointing authority, shall forthwith be furnished to the commission and entered upon its records, and shall also be entered on the records of the department or office in which the removed, discharged, fined or reduced person was or is employed. The officer, clerk or employee shall at once be notified, in writing, of the action taken on such charges and answer. The action of the appointing authority ordering or directing such removal, discharge, fine or reduction shall not take effect until approved by order of the commission. If, however, such person so ordered or directed to be removed, discharged, fined or reduced shall not, within 20 days after notification, as aforesaid, apply to the commission for an investigation of the charges on which such order of removal, discharge, fine or reduction is based, under such rules as the commission shall prescribe, such order may be approved, as of course, without hearing or investigation.

(Emphasis added). Plaintiff states that although he was not removed or discharged, the defendants' pattern of harassment had the effect of reducing his position:

> The facts in the present case show a pattern of harassment by the defendants toward the plaintiff, including stripping him of the duties, status, and other indicia of his rank, done with the deliberate, malicious intention of avoiding any procedural rights he might have claimed. While plaintiff does not argue that he would have been entitled to procedural due process rights before a single

> reprimand could be issued, the series of reprimands, along with unreasonable and even outrageous demands by the defendants and other acts of abuse set forth more fully in other sections of this brief, caused him great harm and served to *reduce* his position. Taken as a whole, the actions have deprived the plaintiff of property rights without due process. The aims and purposes of the legislature in providing tenure rights to public employees such as plaintiff are thwarted if employers can *harass* employees to the point of making them ill without being held accountable.

(Plaintiff's Brief at 26; emphasis in original).

The language in N.J.S.A. 11:22-38 of "fined or reduced" was applied in the *Salerno* case wherein Judge Cohen of this district court found that plaintiff had a cognizable property right in the powers and indicia of his position as a Deputy Warden even though plaintiff had not been permanently discharged. The Court reasoned:

> . . . the words "fined or reduced" in the above statutory provision evince a legislative intent to accord public employees, such as plaintiff, minimum procedural safeguards when they are disciplined as well as when they are discharged. Moreover, in *Goss v. Lopez*, 419 U.S. 565, 576, 95 S. Ct. 729, 737, 42 L.Ed. 2d 725 (1974), the Supreme Court held that an Ohio statute permitting public school officials to suspend high school students for ten days for alleged misconduct without fair notice or a hearing violated the Due

> Process Clause, on the ground that the students had property interests in educational benefits, and liberty interests in maintaining their reputations that could not be taken away without observing the minimum procedures required by the Due Process Clause. Just as the Supreme Court in *Goss* found that plaintiffs had cognizable property and liberty interests even though they were not permanently expelled from school, so too does this Court find that plaintiff has a cognizable property interest in the powers and indicia of his position as Deputy Warden, even though he was not permanently discharged.

555 F. Supp. at 760.

Mr. Salerno alleged that the Camden County Sheriff continuously subjected him to a course of harassment consisting of:

> . . . changes in the hours and places of employment, curtailment of his duties and responsibilities as Deputy Warden, suspension without pay without first being charged with a specific offense, and the untimely filing of charges for alleged past offenses, without notice and without any opportunity to defend his reputation as a public employee or challenge the gradual erosion of his duties and responsibilities.

Id.

Analogizing to the Supreme Court's finding that a 10-day suspension from school was not a *de minimus* deprivation, the

Appendix C

Salerno Court ruled that plaintiff's alleged deprivations were not *de minimis* because they interferred with his interest in his job and his reputation as a reliable employee. *Id.* at 760-1. Without stating what process was due in that situation, Judge Cohen held that plaintiff was denied due process because he was not given notice and an opportunity to be heard at a meaningful time. *Id.* at 781, *citing, Fuentes v. Shevin,* 407 U.S. 67, 81 (1972), *reh'g denied,* 409 U.S. 902 (1972).

This Court is not persuaded, on the basis of the *Salerno* holding, that Mr. Zamboni was denied his Fourteenth Amendment right to procedural due process. First of all, the *Salerno* case is distinguishable in a couple of respects. Secondly, plaintiff asserts that he was denied due process in connection with the entire series of disciplinary actions imposed by defendants, not with regard to any single discipline. However, looking at the process actually afforded Mr. Zamboni in connection with each type of disciplinary action, it becomes apparent that plaintiff received the process that was due under the New Jersey Civil Service law and New Jersey Administrative Code. Plaintiff has not taken issue with the constitutionality of those legal provisions.

Even accepting the *Salerno Court's* conclusion that N.J.S.A. 11:22-38 grants New Jersey civil servants a property interest in not being disciplined, this Court finds that the *Salerno* decision does not warrant the conclusion that Mr. Zamboni was denied due process in connection with the disciplinary actions at issue. *Salerno* is distinguishable in two respects. First, the disciplinary actions to which Mr. Zamboni was subjected pale in comparison to that imposed upon Mr. Salerno which resulted in part in his loss of 65 days of pay, 6 days of leave and retirement account contributions for the 65-day period. Secondly, Mr. Salerno was afforded less procedural protections than was Mr. Zamboni. Mr.

Appendix C

Salerno was suspended without first (or ever) being notified of the charges against him in violation of N.J.A.C. 4:1-16.7(a)(4). Also, the audit conducted by the Civil Service Commission revealed that plaintiff Salerno was not performing duties commensurate with his position but those results were never acted upon by defendants. No such claims have been made in this case.

Additionally, this Court does not read Judge Cohen's opinion to say that Mr. Salerno was "reduced" within the meaning of N.J.S.A. 11:22-38 by the totality of defendants' actions and therefore, plaintiff was entitled to the protections of that statute, *i.e.*, notice and opportunity to be heard, prior to the occurrence of the reduction. If that is the message of *Salerno*, this Court finds it to be impracticable. If a series of disciplinary actions can constitute a reduction under N.J.S.A. 11:22-38, requiring the employer to give the affected civil servant pre-reduction notice, how is the employer to know at what point a reduction actually occurs?

The record indicates that Mr. Zamboni was afforded all process that is provided by New Jersey's statutory and administrative schemes. With regard to the $100 fine imposed on plaintiff, in accordance with N.J.S.A. 11:22-38 and 11:22-39, he received a hearing at which he appeared and presented his defenses. The fine was imposed only after the Department of Civil Service upheld charges of insubordination and breach of discipline. (Defendants Brief, Exh. F). In connection with the fine, plaintiff certainly received the process due him under the applicable N.J. statutes.

As for plaintiff's four-day suspension, in accordance with N.J.A.C. 4:1-16.7(a)(4), he was notified in advance of the charges upon which the suspension was based (Defendants' Brief, Exh.

G), and was given the opportunity to rebut those charges in writing. (Defendants' Brief at 36). In compliance with N.J.A.C. 4:1-16.7(b) and 4:1-23.2, Mr. Zamboni was afforded the opportunity to grieve his suspension under the grievance procedures established in his collective bargaining agreement. (Defendants' Brief, Exhibit H). Mr. Zamboni pursued only the first of three available steps. (Plaintiffs' Brief, Exhs. M, N). He now argues that "[i]t is evident that any efforts by the plaintiff to grieve the wrongs being done to him were futile since the very persons to whom he had to appeal were the ones persecuting him." (Plaintiffs' Brief at 27). However, at Step 2, plaintiff's grievance would have been reviewed not only by Chief Maloney, who issued the reprimands against plaintiff, but also First Assistant County Prosecutor Tucker. In any event, Mr. Zamboni could have had his suspension reviewed by the Law Division of the state courts via a common law writ of *certiorari*. *Romanowski v. Brick Township*, 185 N.J. Super. 197 (Law Div. 1982), *aff'd*, 192 N.J. Super. 79 (App. Div. 1983).

As for plaintiff's claim that he was required to work "outof-title," N.J.S.A. 11:22-12 provides that "[n]o person shall be . . . assigned to perform duties other than those properly pertaining to the position which he legally holds." *See also*, N.J.A.C. 4:1-6.4. In this case, plaintiff requested and received a desk audit performed by the Department of Personnel of the State of New Jersey which concluded that plaintiff's duties should be classified under the title of County Detective rather than Lieutenant of County Detectives. (Plaintiff's Brief, Exh. Q). The Department required County Prosecutor Stamler to either assign plaintiff to the performance of duties commensurate with the specification for Lieutenant of County Detectives or institute demotional procedures. Unlike the *Salerno* case, plaintiff has not shown that the County Prosecutor has failed to comply with the Department's directive. Plaintiff also tried to litigate this issue in the state trial

and appellate courts. The Appellate Division declined to decide the issue simply because it was then the subject of investigation by the Department of Civil Service. *Zamboni v. Stamler,* 199 N.J. Super. 378, 383, 388-9 (App. Div. 1985).

Finally, with regard to the several reprimands issued against plaintiff, he has not refuted defendants' assertion that the placing of reprimand letters in a civil servant's file which does not result in the loss of the employee's job or exclusion from a profession does not alone constitute a deprivation of liberty or property. *See Linhart v. Glatfelter,* 771 F. 2d 1004, 1008-9 (7th Cir. 1985).

Nor has plaintiff disputed defendants' contention that the minor personnel actions of not assigning plaintiff a car, requiring plaintiff to turn in his revolver and the like were within the sole discretion of the Prosecutor and involved no legitimate expectation by plaintiff of a property entitlement in these matters. (Defendants' Brief at 37).

In sum, Mr. Zamboni received the process due under current New Jersey law, the source of his property rights. Plaintiff has not argued that the applicable New Jersey Statutes and Administrative Code are unconstitutional. Nor has he provided any authority for the proposition that he was entitled to a hearing before each disciplinary action was imposed. For example, assuming arguendo that a reassignment can constitute a deprivation of a property right if working out of title results, the Court has uncovered no New Jersey law requiring the appointing authority, *i.e.*, the Union County Prosecutor's Office here, to give the civil servant an opportunity to be heard prior to being assigned to a new position.

Appendix C

B. Substantive Due Process

Even if the Court were to adopt the determination of *Salerno* that plaintiff has a property interest in his position as Lieutenant Detective at the Union County Prosecutor's Office, his claimed violation of substantive due process rights must be dismissed. Assuming that all the actions taken against plaintiff did take place, in retaliation for his complaints and actions opposing defendant Stamler's personnel policies, those acts did not "deprive" him of that property right. U.S. Const. Amend. 14, § 1. The separate and cumulative acts perpetrated upon plaintiff Salerno were considerably more severe than those in the present case. For many of the reasons discussed above which demonstrate the minor actions taken against plaintiff, his property right to serve as a Lieutenant Detective was not taken from him or so abridged as to constitute a deprivation of that right. If the *Salerno* case would support a different result, this Court is unpersuaded by that decision, finding *Altman v. Hurst,* 734 F.2d 1240 (7th Cir. 1984), *cert. denied,* 489 U.S. 982 (1984), more applicable to the case at bar.

III. Third Claim For Relief, Retaliation Contrary to the New Jersey Civil Service Law and Public Policy of New Jersey

The motion is granted dismissing this Claim for the reasons stated from the bench at the conclusion of oral argument on May 21, 1987.

Appendix C

IV. Fourth Claim For Relief, Intentional Infliction of Emotional Distress[2]

Defendants move for summary judgment of the Fourth Claim For Relief alleging intentional infliction of emotional distress on the ground that defendants' course of harassment, accepted as true, is not actionable under New Jersey law.

New Jersey courts first recognized the tort of intentional infliction of emotional distress in the case of *Hume v. Bayer,* 178 N.J. Super. 310 (Law Div. 1981). There, the court held that when a physician tells the parents of his patient that "their child is suffering from a rare disease which may be cancerous knowing that the child has nothing more than a mildly infected appendix," these actions evidenced an intent by the doctor to inflict emotional distress on the child's parents. *Id.* at 319. In recognizing intentional infliction of emotional distress as an independent cause of action, the court sought guidance in Restatement (Second) of Torts § 46, which defined the tort in part as follows:

> § 46. Outrageous Conduct Causing Severe Emotional Distress
>
> (1) One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such

---

2. Realizing that it is empowered to dismiss the Third and Fourth Claims for Relief for lack of pendant jurisdiction, now that all federal claims have been dismissed, the Court has determined that since those claims are clearly without merit under New Jersey law, it would be a disservice to all parties (and to sound principles of judicial administration) to dismiss those claims without prejudice to their renewal in a state court complaint. Accordingly, both Claims are being adjudicated and dismissed, on the merits.

> emotional distress, and if bodily harm to the other results from it, for such bodily harm.

Id. at 315. The type of conduct which is typically recognized by courts as outrageous is that which is so extreme as to go beyond all possible bounds of decency, to be atrocious and utterly intolerable in a civilized community. *Id.* at 314-15 (*citing* Restatement (Second) of Torts § 46 comment d). Moreover, conduct, to be considered outrageous, not only must exceed all bounds usually tolerated by decent society but must be especially calculated to cause and must in fact cause mental distress of a very serious nature. *Id.* at 315 (*citing* Prosser, *Law of Torts* § 12 (4th ed. 1971)). Focusing on this type of conduct, the court in *Hume* recognized an independent cause of action for intentional infliction of emotional distress in the absence of bodily injury. The court concluded that safeguards were built into this action because a claim would be actionable only where the actor's conduct was intentional and the emotional distress it produces is severe. *Id.* at 319.

"The court must determine, as a matter of law, whether there is sufficient evidence for reasonable persons to find extreme or outrageous conduct." *Chuy v. Philadelphia Eagles Football Club,* 595 F. 2d 1265, 1274 (3d Cir. 1979). If there is not, defendants' motion for summary judgment must be granted. "Where reasonable men may differ, it is for the jury, subject to the control of the court, to determine whether, in the particular case, the conduct has been sufficiently extreme and outrageous to result in liability." Restatement (Second) of Torts, §46, Comment h (1965).

Due to the death of New Jersey caselaw, the Court has considered decisions in other states which have similarly adopted

the standard enunciated in §46 of Restatement (Second) of Torts. The Court's review of that caselaw requires that it grant defendants' motion for summary judgment.

Plaintiff defends his claim by reiterating the defendants' harassing activities of seeking plaintiff's demotion, filing petty reprimands against him, checking up on him when he was ill, attempting to ostracize him, and the like. He asserts that such abuse was "outrageous, and 'outside the bonds [*sic*] of human decency,'" (Plaintiff's Brief at 41), sufficiently so that his claim should be submitted to the jury. In support of this argument, Mr. Zamboni relies upon caselaw involving either racial or sexual harassment. *See Lucas v. Brown & Root, Inc.*, 736 F. 2d 1202 (8th Cir. 1984); *Shaffer v. National Can Corp.*, 565 F. Supp. 909 (E.D.Pa. 1983); *Rogers v. Loews L'Enfant Plaza Hotel*, 526 F. Supp. 523 (D.D.C. 1981); *Contreras v. Crown Zellerbach Corp.*, 565 P. 2d 1173 (Wash. 1977); *Alcorn v. Anbro Engineering, Inc.*, 468 P. 2d 216 (Cal. 1970).

The Court declines to follow the authorities cited by plaintiff, because those upon which defendants rely are much more factually apposite. In a number of cases addressing claims of intentional infliction of emotional distress in the context of employment disputes, the Court has granted motions to dismiss and for summary judgment. In a case very similar factually to the case at bar, the Eleventh Circuit affirmed the district court's entry of summary judgment. *Mundy v. Southern Bell Tel. & Tel. Co.*, 676 F. 2d 503 (11th Cir. 1982). The plaintiff there alleged:.

> . . . that this harassment, which began in early 1973, included: threats by his superiors to "get" Mundy or "destroy" his career; transfers to less desirable job assignments, including one lateral

> transfer from a staff job to a line job from which he could be more easily demoted; unfair and improper evaluations of Mundy for possible pay raises; inaccurate and unsupported negative evaluations of his job performance; refusals to approve reimbursement for legitimate business expenses incurred by Mundy; attempts to damage his credibility with his peers and superiors and to alienate his peers and subordinates; and rejections of legitimate suggestions made by Mundy.

Id. at 504.

Indeed, summary judgment has been granted even where, unlike the situation here, the abuse suffered by plaintiff actually resulted in her termination. *Wells v. Thomas,* 569 F. Supp. 426 (E.D.Pa. 1983). In *Wells,* plaintiff's claim for intentional infliction of emotional distress was based on the following facts:

> As a basis for her claim, plaintiff avers that defendants, without cause, stripped her of her position as Personnel Director at HUP and placed her in a newly created position without responsibilities. They took away plaintiff's private office and had her working in a "corral space." Her secretary was reassigned to someone who had previously reported to Wells and a line was removed from plaintiff's phone without prior consultation. Wells was the only managerial level employee who, if she was away from her desk, would have her phone calls go unanswered. Additionally, Thomas gave plaintiff poor performance evaluations on two occasions, the first

> time she was rated below excellent in 25 years. Failure to give Wells an annual salary increase in 1977 and her final termination have also been pleaded in support of this claim.

Id. at 433. Applying the standard set forth in §46 of the Restatement (Second) of Torts, the Court held that defendants' conduct was not sufficiently extreme and outrageous to support her claim. In so holding, the Court contrasted the *Shaffer* case upon which plaintiff relies. *Id.* at 434.

Persuasive support for defendants' summary judgment motion can also be found in *Sharon Steel Corp. v. VJR Co.*, 604 F. Supp. 420 (W.D. Pa. 1985); *Brink's Inc. v. City of New York*, 533 F. Supp. 1123 (S.D.N.Y. 1982); *Cautilli v. GAF Corp.*, 531 F.Supp. 71 (E.D. Pa. 1982); *Beidler v. W. R. Grace, Inc.*, 461 F. Supp. 1013 (E.D. Pa. 1978), *aff'd mem.*, 609 F. 2d 500 (3d Cir. 1979).

In sum, the Court determines that accepting as true the course of harassment by defendants as outlined by plaintiff, as a matter of law there is insufficient evidence for reasonable persons (jurors) to find that defendants' conduct was extreme and outrageous. Defendants' motion for summary judgment on the Fourth Claim For Relief is granted.

CONCLUSION

For the reasons set forth above, defendants' motions for summary judgment are granted and the Amended Verified Complaint is dismissed, with prejudice. Although defendant Union County Prosecutor's Office did not formally join in these motions, the grounds for dismissal are equally applicable to that defendant;

accordingly all claims against it are dismissed as well. The parties will also note that the issue of immunities was not adjudicated because, in light of the Court's other rulings, it was unnecessary to do so. A copy of an Order reflecting the Court's decision is enclosed.

DATED: June 9, 1987

s/ John W. Bissell
JOHN W. BISSELL
UNITED STATES
DISTRICT JUDGE

APPENDIX D — LETTER FROM JOHN ZAMBONI TO EUGENE McCAFFREY DATED MARCH 8, 1983

UNION COUNTY PROSECUTOR'S OFFICE
UNION COUNTY ADMINISTRATION BUILDING
ELIZABETH, NEW JERSEY 07207 (201) 527-4500

March 8, 1983

Eugene J. McCaffrey Sr.
New Jersey Department of
Civil Service
Box CN 310
East State Streetand Montgomery Streets
Trenton, New Jersey 08625

Dear Mr. McCaffrey:

I would like to bring to your attention a situation involving nonconformance to the duties and responsibilities relating to job classification as set forth by the Civil Service Commission, by the appointing authority of the Union County Prosecutor's Office.

On November 16, 1982, Prosecutor John H. Stamler summoned the superior officers of the Detective Bureau staff to a meeting in his office, at which time he informed said officers of his intention to reorganize the Detective Bureau by, what amounted to, disregarding the intent of the statutory authority governing the Classified Service of the Department of Civil Service.

Prosecutor Stamler, at said meeting, stated that he was dissatisfied with current Civil Service Regulations and Procedures. He specifically indicated that he wanted a free hand in promoting and assigning investigative personnel, pointing out that the promotional procedures involved in the Civil Service process were

too slow for his liking, and restricted his freedom to appoint or promote his own choices. Aside from the current roster of superior officers, the Prosecutor commented that he intended to promote individuals in the Unclassified Title of investigator to the position of Sergeant of Investigators, and that he would be able to do this by our following his request to "sign off" from our Civil Service status. The Prosecutor then afforded the participants at the meeting two alternatives:

> 1. Take a leave of absence from the Classified Civil Service Title and accept an appointment in the Unclassified Civil Service position of investigator (in my case, a leave of absence from the position of Lieutenant of County Detectives, to be resworn in the position of Lieutenant of County Investigators, i.e., from the Classified to the Unclassified section of Civil Service). By so doing, the Prosecutor asserted that we would lose nothing by way of salary or job security, but would stand to gain a promotion and higher salary - at his discretion as opposed to Civil Service Standards or,
>
> (2) We could choose to remain in our present Classifications, which, according to Prosecutor Stamler, meant that we would remain in our present title for at least the next five (5) years with no chance for advancement, as he clearly stated that he had no intention of calling for a competitive examination under Civil Service Rules and Regulations, at any time during his tenure in office.

The Prosecutor further stated that should we accept his reclassified appointment under the terms presented, he would personally interview each superior officer, as well as submit a series of

questions of his own making to each officer for their written responses. He would then make his promotional determination. Obviously, in light of the above alternatives, there was little choice for these superior officers who have higher aspirations, especially since the Prosecutor mentioned that he had had the pertinent regulations researched and checked out with Civil Service. In essence, the superior officers felt as though we had little alternative but to take what amounted to a chance, and accept Mr. Stamler's proposal, and take his word as to the validity of same.

After requesting, and receiving, a personal interview with the Prosecutor, and upon receiving assurances that his proposals were legitimate and that I would receive equal consideration for promotion (he told me that I was one of his best "two or three superior officers", and I had been doing an excellent job), I signed two previously prepared CS-6 forms on November 29, 1982 - one requesting a six month leave of absence from the classified Service as a Lieutenant of County Detectives, effective January 1, 1983 through June 30, 1983, and the other requesting appointment as a Lieutenant of County Investigators in the Unclassified Service, effective January 1, 1983.

On January 10, 1983 I took the aforementioned written "examination" which was conducted and monitored by Prosecutor Stamler. On January 14, 1983 I had a personal interview with Prosecutor Stamler, at which time he advised me that my written responses to his questions were the best of any the superior officers taking the test. He asked my opinion of certain aspects of the Prosecutor's Office he was considering changing, while again repeating that I was one of his best superior officers, and was doing an outstanding job.

On February 25, 1983 I was summoned to Prosecutor Stamler's

Appendix D

Office and informed that I was not being promoted, and further, that I was being transferred to the Trial Unit, where I would be responsible for assisting those assistant prosecutors assigned to a specific Criminal Court in the Union County judicial system. The duties entailed, include the contacting of witnesses, serving subpoenaes, etc. - no supervisory role at all. The Prosecutor explained his position on the matter by stating that, "superior officers are needed in the Trial Unit so that they will command more respect from municipal police departments when requesting the appearance of police officers for a trial." The Prosecutor also mentioned that he knew that my wife has been ill, and although "not in constant need of care, her illness must be a burden on me", and indicated that being in the Trial Unit will afford me "more time at home." Well, first of all, my wife does have multiple sclerosis, and other ailments. However, she is quite self-sufficient, and her illness has never caused me to miss an assignment, nor has it in any way affected my work performance. Mr. Stamler is obviously using this situation as an excuse to his own advantage; if he was really concerned, I am sure he is aware that working in a Trial Court holds out the possibility of extra work more so than my previous assignment, as Commander of the Welfare Fraud Unit. I can assure anyone that my wife's illness has not, and does not, prevent my serving in any capacity whatsoever in the Union County Prosecutor's Office. Needless to say, the Prosecutor's mention of her illness, and his alluding to its affect on my ability to function within the office has caused my wife considerable, unwarranted stress.

Second, the Prosecutor's reasoning that superior officers are needed to staff the Trial Courts, allegedly to insure that requests to municipal police officers for their attendance in Court command more respect, is misleading at best, and at worst, untrue. The Trial Unit, in my 16 years experience with the Prosecutor's Office

has always been staffed with subordinates, i.e., detective/investigators, with a superior officer, in command. Meeting the requirements of the job has always been accomplished with a minimum of difficulty. Empirically,those municipal police departments with even a modicum of discipline respond to a request for appearance of officers in Court without reservation, while the few who are difficult to work with, are a problem regardless of the rank or position of those so requesting their appearance. Further, if the Prosecutor's assertion is valid, or had any merit whatsoever, he wouLd not have placed at the same time, two subordinate titles, one investigator and one detective, in the Trial Unit each to service their respective Court assignment - the same assignment as I was given. The contradiction here is self-evident.

In addition to myself, one Captain has been assigned to command the Trial Unit, and service a Court at the same time, one other Captain, and one Lieutenant other than myself, have also been assigned to service a Trial Court, along with the aforementioned detective and investigator. The superior officers, who, along with myself, encompass the Civil Service staff of superior officers who were not promoted according to the aforementioned procedures set forth by Prosecutor Stamler have been demeaned in their profession, and relegated to working out of Title per Civil Service Rules and Regulations. Demeaned to the extent that all concerned with office policy and procedure (with the exception of course, of the Prosecutor and those close to him) as superior officers, assistant prosecutors, detective bureau personnel, and clerical personnel, consider the assignment to the Trial Court as a demotion - in fact, if not in name. Further, the Trial Unit has been used frequently in the past as a punishment assignment for investigative personnel who either ran afoul of the administration, or failed to competently perform in another Unit.

Appendix D

To complete the subterfuge on the part of Prosecutor Stamler, I have been advised by Civil Service that the Prosecutor has not, to date, solicited the advice or approval of Civl Service as to his personnel changes, as is mandated by Civil Service Regulations. In fact, I have found that the CS-6 forms I had signed in good faith on 11/29/82, were never submitted to Civil Service. This was confirmed by Assistant Prosecutor Harold Knox, who on 3/3/83 stated he was still in possession of said forms. On the instruction of Prosecutor Stamler, Assistant Prosecutor Knox refused to return said forms upon my request, commenting that he would not return them - but would not forward them to Civil Service after I had indicated I did not want to follow through with the request for a leave of absence. Those other officers who signed the original CS-6 forms, as did I, on or about 11/29/82, and who were subsequently promoted during the week of 2/28/83, signed new CS-6 forms relecting their change in status from their title in the Classified portion, to a higher promotional title in the Unclassified section. Again, it is my understanding that this was accomplished without the advice or approval of the Civil Service Commission. I have since been advised by Civil Service that there are no such valid titles as Captain, Lieutenant, Sergeant, in the Unclassified section.

I would like to point out that I have held a supervisory position in the Union County Prosecutor's Office since my certification, after taking an open competitive examination, as a detective in 1973, and on up through the ranks. My personnel file reflects an impeccable record, which includes numerous commendations. My assignment prior to the transfer to the Trial Unit effective 3/9/83, was as Commander of the Welfare Fraud Unit since its inception on 7/2/79. This Unit combines personnel and resources from both the Union County Prosecutor's Office and the Union County Board of Social Services, and is one of its kind in the

State of New Jersey. As Unit Commander I have been responsible for supervising a staff in excess of 20. The Unit has received a National Award for excellence.

I have gone into such detail concerning the facts of this matter in order to present as complete and accurate a picture as possible. I have only pointed out Prosecutor Stamler's remarks as to my job performance and competency as a supervisor, and added my own comments as to my service record, in order to allow for the fact that unsuitability for a supervisory position is not a factor nor an issue here. Prosecutor Stamler's remarks concerning my wife, and his ostensible reason for transferring myself and others to non-supervisory, out of title positions, were elaborated on merely to illuminate his attempts to obfuscate his real reasons, whatever they may be, for his arbitrary actions.

I realize that my complaints may be taken as "sour grapes", as I was not one of the superior officers selected for promotion. I can assure you that this is not the case. I cannot of course, speak for the superior officers left in the same position as I am - nor can I speak for the four detectives in the Classified service who were never even afforded the opportunity to take a leave of absence and thus become eligible for promotion along with the investigators in the Unclassified service, who have been given this opportunity according to the Prosecutor's Organizational Plan. This hippocracy on the part of the Prosecutor, I am sure they will deal with in their own good time. I can only say, in all honesty, that what has transpired does not come as a surprise. Prosecutor Stamler's egotistical mentality and vindictive personality has, at one time or another, touched almost every member of the Prosecutor's staff. The abnormal number of resignations from the professional staff during his tenure in office is but one indication of this aspect, and there are many others

that I can point out, and back up, should this be necessary. No, it is not "sour grapes", but a sense of deep frustration and chagrin at being lied to and deceived that I write this letter.

In essence, in view of the above mentioned circumstances, my complaint is two-fold:

1. By prescnting myself and the other superior officers with a "fait accompli" regarding future promotions while indicating that he had received Civil Service approval for his program, Prosecutor Stamler deceived, and, coerced me into signing a CS-6 form reflecting a request for a leave of absence from the Classified to the Unclassified service. In furtherance of this deceitfulness Prosecutor Stamler did not forward said CS-6 forms to Civil Service but turned around and had those officers he decided to promote sign a new CS-6 form - several months later, from November 1982, to March 1983 - reflecting a change of Title and Classification, thereby leaving me in an untenable position as to my status within the office. Implicit in his actions, is the Prosecutor's purposeful attempt to subvert the Civil Service system and carry out his own plans, without regard to the law. In fact, the Prosecutor went so far as to make the promotions reflected on the second CS-6 form signed on 3/3/83 effective that same date, before forwarding same to Civil Service for approval.

2. By his action in transferring me to the Trial Unit, whatever the ostensible reason (it is obvious that neither of the two reasons given me at the time are valid under the circumstances), not in a supervisory capacity, but, in fact, with the exact same duties and responsibilities as those individuals with a subordinate title, while other units of

the office are commanded by personnel in an Unclassified position, is clearly an abuse of Civil Service Regulations concerning the assignment of work according to Title and Classification. Just because Prosecutor Stamler finds the Rules and Regulations of the Department of Civil Service not to his liking, does not exempt or justify his arbitrary disregard of its provisions.

By his actions as described herein, I respectfully submit that Prosecutor Stamler is in violation of the following:

a. Article VII, Section 1, Paragraph 2 of the State of New Jersey Constitution, which reads as follows:

> "Appointments and promotions in the civil service of the state, and of such political subdivisions as may be provided by law, shall be made according to merit and fitness to be ascertained, as far as practicable, by examination, which as far as practicable, shall be competitive; except that preference in appointments by reason of active service in any branch of the military or naval forces of the United States in time of war may be provided by law."

b. Civil Service Rules.

(1) 4:1-6.3 as pertains to Classification of positions.

(2) 4:1-6.4 as pertains to Title appropriate to duties performed.

Appendix D

(3) 4:1-6.5 as pertains to Reclassification of positions.

(4) 4:1-6.6 as pertains to Changes in Classification plans.

(5) 4:1-6.7 as pertains to Allocation and reallocation of Class Titles.

c. Civil Service Rule 4:1-21.4 as pertains to Prohibited Conduct.

respectfully request that the Civil Service Commission take the appropriate action necessary to rectify this situation.

Thank you for your courtesy and cooperation.

Very truly yours,

JOHN N. ZAMBONI,
Lieutenant

cz
Encl: Memorandum from Prosecutor Stamler re:

Promotional Assignment Detective Bureau dated November 16, 1982
Memorandum from Prosecutor Stamler re:
Promotional Process dated December 29, 1982
Memorandum from Captain W. Donald Ballatt re:
Re-Assignment dated March 7, 1983

APPENDIX E — LETTER FROM JOHN ZAMBONI TO JOHN STAMLER DATED MARCH 21, 1983

UNION COUNTY PROSECUTOR'S OFFICE
UNION COUNTY ADMINISTRATION BUILDING
ELIZABETH, NEW JERSEY 07207 (201)527-4500

March 21, 1983

Honorable John H. Stamler
Union County Prosecutor
Administration Building
Elizabeth, New Jersey 07207

Dear Prosecutor Stamler:

I am writing this letter as a protest against my recent assignment to the Trial Unit. I specifically refer to the following sequence of events:

On February 25, 1983, I was summoned to your office, where you informed me that I was being transferred to the Trial Unit. At the same time, you informed me that I was not being promoted according to your recently institutioned promotional system.

The assignment to the Trial Unit reflects a change of position from command of a Unit encompassing over twenty (20) personnel assigned from both the Prosecutor's Office and the Union County Board of Social Services, to a position involving no supervisory responsibilities, and a position which is normally filled by a Detective or Investigator. You indicated that my job performance was excellent. You then gave the following reasons for my transfer: You stated that:

Appendix E

(a) My wife's longstanding illness must be a burden on myself, and working in the Trial Unit would not be that difficult and allow me to spend more time at home. I would state here and now that my wife is quite self-sufficient, and her illness has never caused me to miss an assignment nor has it in any way affected my work performance, as you implied. I take umbrage at your suggestion in this regard. Further, if this was a real concern, I am sure you are aware that working in Trial Court holds out the possibility of extra work, more so than my previous assignment.

(b) You stated that superior officers are needed to staff the Trial Courts, allegedly to insure that requests to municipal police officers for their attendance in Court command more respect, is misleading at best, and at worst, untrue. The Trial Unit, in my sixteen (16) years experience with the Prosceutor's Office has always been staffed with subordinates, i.e. detective/ investigator;, with a superior officer in command. Meeting the requirements of the job has always been accomplished with a minimum of difficulty. Empirically, those municipal police departments with even a modicum of discipline respond to a request for appearance of officers in Court without reservation, while the few who are difficult to work with, are a problem regardless of the rank or position of those so requesting their appearance. Further, if your assertion is valid, or had any merit whatsoever, you would not have placed at the same time, two subordinate titles, one investigator and one detective, in the Trial Unit - each to service their respective Court assignment - the same assigmment as I was given. The contradiction is self-evident.

Appendix E

I respectfully submit that your action in this regard is in possible violation of the following:

a. Article VII, Section 1, Paragraph 2 of the State of New Jersey Constitution which reads as follows:

> "Appointments and promotions in the civil service of the state, and of such political subdivisions as mey be provided by law, shall be made according to merit and fitness to be ascertained, as far as practicable, by examination, which is as far as practicable, shall be competetive; except that preference in appointments by reason of active service in any branch of the military or naval forces of the United States in time of war may be provided by law."

b. Civil Service Rules.

(1) 4:1-6.3 as pertains to Classification of positions.

(2) 4:1-6.4 as pertains to Title appropriate to duties performed.

(3) 4:1-6.5 as pertains to Reclassification of positions.

(4) 4:1-6.6 as pertains to Changes in Classification plans.

(5) 4:1-6.7 as pertains to Allocation and reallocation of Class Titles.

Appendix E

(6) Civil Service Rule 4:121.4 as pertains to Prohibited conduct.

c. The New Jersey Department of Civil Service Class Specifications concerning the duties and responsibilities of a Lieutenant of County Detectives.

In making this protest, I also point out the following memorandum from Acting Chief W. Donald Ballatt dated March 8, 1983, re: Transfers - I cite from said memorandum "Effective Wednesday, March 9, 1983, Lieutenant John Zamboni is assigned to the Trial Unit. He will service the Trial Team consisting of A/P David Kupfer and A/P Kenneth Pogash servicing the Court of Judge McKenzie.

With this letter, I respectfully request an assignment to a command position in accordance with the Civil Service Class Specification for a Lieutenant of County Detectives.

I have consulted with private Counsel, and at his suggestion, in the interest of fairness and courtesy, we are affording you the opportunity to remedy this wrong.

I respectfully request your immediate attention to this matter.

Very truly yours,

John N. Zamboni
Lieutenant of County Detectives

JNZ:and

APPENDIX F — COMPLAINT IN LIEU OF PREROGATIVE WRIT

(Filed May 16, 1983)

ROBERT BRADLEY BLACKMAN
1997 Route 27
Edison, New Jersey 08817
(201) 287-8420
ATTORNEY FOR PLAINTIFF

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION
UNION COUNTY
DOCKET NO.

CIVIL ACTION

JOHN ZAMBONI,

Plaintiff,

v.

JOHN STAMLER and UNION COUNTY PROSECUTOR'S OFFICE,

Defendant.

COMPLAINT IN LIEU OF PREROGATIVE WRIT

Plaintiff, JOHN ZAMBONI, residing at 15 Coldevin Road, in the Township of Clark, County of Union, and State of New Jersey, complaining of defendant. says:

1. At all times hereinafter stated, plaintiff, John Zamboni,

is a lieutenant of detectives employed by the Union County Prosecutor's Office and as such has been a lieutenant of Detectives for a number of years.

2. At all times hereinafter stated, defendant, John Stamler, was the prosecutor for the Union County Prosecutor's Office and as such was charged with command of the Union County Prosecutor's Office.

3. At all times hereinafter stated, defendant, Union County Prosecutor's Office was the prosecutorial branch of the government of Union County and as such employed the plaintiff.

4. On November 16, 1982, Defendant, John Stamler, held a meeting with the superior officers of the Union County Prosecutor' Office Detective Bureau. At said meeting, defendant Stamler announced that he intended to reorganize the Detective Bureau. Defendant Stamler indicated that he would implement this reorganization by promoting individuals with the unclassified title of Investigator, as opposed to individuals with the Civil Service classified title of Detective.

5. In order that he might make said promotions, defendant Stamler indicated to the members present that, if they wished to be eligible for promotion, they would have to execute Civil Service forms requesting a leave of absence from their classified status and assignment to the unclassified status. The effect of such action would be to give defendant Stamler free reign in the promoting of officers and allow him to make such moves as he saw fit without reference to Civil Service rules and regulations.

6. At the same meeting, defendant Stamler indicated to the officers present that anyone who did not participate in his

promotion plan would not be promoted for the remainder of Stamler's term, a period of five years.

7. Because the plaintiff desired a promotion and because he realized that he would not get a promotion without effectuating a transfer, he signed, under great duress and pressure, previously prepared Civil Service transfer forms.

8. After signing said forms, plaintiff Zamboni underwent a testing and interview procedure conducted by defendant Stamler. Plaintiff Zamboni was constantly reassured by defendant Stamler that he (Zambomi) was one of Stamler's top superior officers.

9. On February 25, 1983, plaintiff Zamboni was informed by defendant Stamler that he was not being promoted and was, in fact, being assigned to duty with the department's trial unit, an assignment outside of his job classification.

10. Said promotion plan as instituted amd implemented by the defendants was arbitrary, unreasonable, discrimimatory, oppressive and unlawful in that,

(a) Said promotion plan is in direct contravention to established Civil Service rules and regulations in that defendants have circumvented established guidelines for the promotion of individuals in the classified service.

(b) By failing to promote the plaintiff and by transferring plaintiff to the trial unit, the defendants are forcing the plaintiff to perform specific duties which are not within his classified title.

WHEREFORE, plaintiff, demands judgment against the defendants:

Appendix F

(A) Adjudging the defendants' promotion plan as instituted and implemented is unlawful;

(B) Adjudging that defendants' continued requirement that plaintiff work outside his job title is unlawful;

(C) Directing defendants to cancel all promotions made under the newly implemented promotion plan;

(D) Directing defendants to cease and desist in the implementation of said unlawful promotion plan;

(E) Directing defendants to institute and implement a promotion plan which is within the rules and regulations of the Civil Service Commission;

(F) Directing the defendants to cease and desist in requiring the plaintiff to perform specific duties which are not within his classified title;

(G) Directing defendants to pay the plaintiff's counsel fees and costs connected to this action.

s/ Robert Bradley Blackman
ROBERT BRADLEY BLACKMAN
Attorney for Plaintiff